Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

TEXAS COMMERCIAL ENERGY,
A TEXAS LIMITED LIABILITY COMPANY,
Petitioner,

v.

TXU ENERGY, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether only the United States Congress can determine the applicability of the filed rate doctrine by amending the Sherman Act, as opposed to the relevant legislative body creating the agency authority?

2. Whether the limited statutory mandate of the PUCT under PURA is sufficient to give rise to the application of the filed rate doctrine?

3. Whether the application of the filed rate doctrine to the Texas Legislature's choice of private antitrust right of action, rather than PUCT refunds, to remedy anticompetitive behavior is unconstitutional?

PARTIES TO PROCEEDING

Petitioner is Texas Commercial Energy, a Texas Limited Liability Company.

Respondents are TXU Energy, Inc., TXU Generation Services Company, L.P., TXU Portfolio Management Company, L.P. (f/k/a TXU Energy Trading Company, L.P.),, TXU Energy Solutions Management Company (f/k/a TXU Energy Services Company), American Electric Power, *Inc.*, AEP Texas Central Company (f/k/a Central Power & Light), AEP Texas North Company (f/k/a West Texas Utilities Co.), American Electric Power Service Corp., AEP Texas Commercial Industrial Retail, L.P., CenterPoint Energy, Inc., CenterPoint Energy Houston Electric, L.L.C. (f/k/a Reliant Energy, Inc.), Texas Genco, L.P., Reliant Resources, Inc., Reliant Energy Electric Solutions, L.L.C., Reliant Energy Retail Services, L.L.C., Reliant Energy Solutions, L.L.C.), Automated Power Exchange, Inc., Electric Reliability Counsel of Texas, TECO Energy Source, Inc., Odessa-Ector Power Partners, L.L.P., Guadalupe Power Partners, L.P., Tractebel Energy Marketing, Inc.

RULE 29.6 STATEMENT

Texas Commercial Energy is a Texas Limited Liability Company and had its principal office in Corpus Christi, Texas. Texas Commercial Energy, because of the actions made the basis of this lawsuit, were forced to file for Chapter 11 bankruptcy in March 2003, and in September 2005 the bankruptcy was converted to Chapter 7. This lawsuit is the sole remaining asset of what once was Texas Commercial Energy.

TABLE OF CONTENTS

Questions Presented ii

Parties to the Proceeding and Rule 29.6 Statement iii

Table of Contents ..... iv, v, vi

Table of Authorities ..... vii, viii, ix, x, xi

Opinions Below 1

Jurisdiction 1

Relevant Statutory Provisions 1

Statement of the Case 2, 3, 4, 5, 6

Reasons Why the Writ Should Be Granted 6

I. The District Court erred by ruling that only the United States Congress can determine the applicability of the filed rate doctrine by amended the Sherman Act, as opposed to the relevant legislative body creating the agency authority. 6, 7

A. The Filed Rate Doctrine is not a part of "antitrust law." 7, 8, 9, 10, 11, 12

B. The Origins of the "Filed Rate Doctrine" Were in congressional Intent to Vest Exclusive Jurisdiction in a Federal Regulatory Agency 12, 13, 14, 15, 16, 17

C. The Application of the "Filed Rate Doctrine" In the Context of the Federal Power Act 18, 19

II. In a case of first impression, the limited statutory mandate or the PUCT under PURA is not sufficient to give rise to the application of the filed rate doctrine 19, 20, 21, 22, 23, 24

III. Application of the filed rate doctrine leaves Petitioner unconstitutionally without a right of recourse 25, 26, 27, 28

Conclusion 28

Appendix Section

Appendix A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND DECIDED JUNE 17, 2005 2-13

Appendix B – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND DECIDED JULY 18, 2005 14-16

Appendix C – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS –

CORPUS CHRISTI
DIVISION DATED
AND DECIDED
JUNE 24, 2004.....17-58

Appendix D – OPINION OF THE
UNITED STATES
DISTRICT COURT
FOR THE SOUTHERN
DISTRICT OF TEXAS –
CORPUS CHRISTI
DIVISION DATED AND
DECIDED JUNE
24, 2004.....59-60

TABLE OF AUTHORITIES

Federal Cases

Arkansas Louisiana Co. v. Hall,
453 U.S. 571, 101 S.Ct. 2925,
69 L.Ed.2d 856 (1981) 14

California v. FERC,
495 U.S. 488, 110 S.Ct. 2024, 109 L.Ed.
2d 474 (1990) 13

Carnation Co. v. Pacific Westbound Conference,
383 U.S. 213, 86 S.Ct. 781, 15 L.Ed.2d
709 (1966) *15*

Chicago & Northwestern Transp. Co.
v. Kalo Brick & Tile Co.,
450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d
258 (1981) 13, 14

Concord v. FERC,
955 F.2d 67, (D.C. Cir. 1992) 26

Entergy Louisiana v. Louisiana Public Service,
539 U.S. 39, 123 S.Ct. 2050, 156
L.Ed. 2d 34 (2003) 13

Keogh v. Chicago & NW Ry. Co.,
260 U.S. 156,
S.Ct. 47, 67 L.Ed2d
183 (1922) 13, 14, 16, 27

Lockyer v. FERC,,
383 F.3d 1006 (9th Cir. 2004) 14, 27

Maslin Indus., U.S., Inc. v. Primary Steel,
497 U.S. 116, 110 S.Ct. 2759, 111
L.Ed.2d 94 (1990) 13, 16, 17

MCI Telecommunications Corp. v. AT&T,
512 U.S. 218, 114 S.Ct. 2223, 129
L.Ed.2d 182 (1994) 14, 16, 17

Midland Telecasting Co. v. Midessa Television,
617 F.2d 1141 (5th Cir. 1980)
cert. denied 449 U.S. 954 (1980) 16

Mississippi Power & Light Co.
v. Mississippi ex rel. Moore,
487 U.S. 354, 108 S.Ct. 2428, 101
L.Ed. 2d 322 (1988) 13

Missouri Pacific R. Co. v. Stroud,
267 U.S. 404, 45 S.Ct. 243, 69
L.Ed. 683 (1925) 14

Montana-Dakota Utilities Co.
v. Northwestern Public Service Co.,
341 U.S. 246, 71 S.Ct.
692, 95 L.Ed. 912 (1951) 13

Nantahala Power & Light Co. v. Thornburg,
476 U.S. 953, 106 S.Ct. 2349,
90 L.Ed. 2d 943 (1986) 13

Resolution Trust Corp. v. Miramon,
22 F.3d 1357 (5th Cir. 1994) 7

Security-Services, Inc. v. Kmart Corp.,
511 U.S. 431, 114 S.Ct. 1702,
128 L.Ed.2d 433 (1994) 17

Square D Co. v. Niagara Frontier Tariff Bureau,
476 U.S. 409, 106 S.Ct. 1922, 90
L.Ed.2d 413 (1986) 13, 15, 16

State of Texas v. United States, et. al.,
730 F.2d 339 (5th Cir. 1984),
cert. denied 469 U.S. 892 (1984) 9

Texas & Pacific Ry. V. Abilene Cotton Oil Co.,
204 U.S. 426, 27 S.Ct. 350, 51
L.Ed. 553 (1907) 13

United States v. Philadelphia Nat'l Bank,
374 U.S. 321, 83 S.Ct.
1715, 10 L.Ed.2d 915 (1963) 15

U.S. v. Toopco Associates,
405 U.S. 596, 92 S.Ct. 1126,
31 L.Ed.2d 515 (1972) 8

Verizon Communications Inc. v. Law
Offices of Curtis v. Trinko, LLP,
124 S.Ct. 872 (2004) 8, 12

State Cases

Cameron v. Terrell & Garrett, Inc.,
618 S.W.2d 535 (Tex. 1981) 20

Citizen's Bank v. First State Bank,
580 S.W.2d 344 (Tex. 1979) 20

City of Corpus Christi v. PUCT,
51 S.W.3d 231 (Tex. 2001) 21

Glyn-Jones v. Bridgestone/Firestone, Inc.,
857 S.W.2d 640, (Tex.
App.—Dallas 1993, writ granted)
judgmt aff'd, 878 S.W.2d
132 (1994) 25

Howell v. Mauzy,
899 S.W.2d 690, (Tex.App. - Austin
1994, writ denied) 20

Jones v. Del Andersen & Assocs.,
539 S.W.2d 348, (Tex. 1976) 20

Laney v. Fairview City,
57 P.3d 1007, 1017 (Utah 2002) 25, 26

LeCroy v. Hanlon,
713 S.W.2d 335, (Tex. 1986) 25

Federal Statutes

Sherman Antitrust Act, §§1 and 2 5

Sherman Antitrust Act, §7..... 13

16 U.S.C. §824 18

28 U.S.C. §1254(1) 1

42 U.S.C. §§ 7151(b), 7172(a), 7291,
7293 (1988)..... 18

18 C.F.R. §35.1(e) 18

State Statutes and Regulations

Texas Free Enterprise and Antitrust Act ("TFEAA"), §15.05(a)-(c) and §15.10 5

TEX. CONST. Art. I §13 25

Tex.Util.Code §17.051 22
Tex.Util.Code §17.001 ..... 22, 23
Tex.Util.Code §17.004 22
Tex.Util.Code §31.001 ..... 7, 23
Tex.Util.Code §32.101 20
Tex.Util.Code §35.002 7
Tex.Util.Code §36.007 20
Tex.Util.Code §39.001 ..... 7, 23, 24
Tex.Util.Code §39.002 21
Tex.Util.Code §39.157 24
Tex.Util.Code §39.158 ..... 1, 7, 12, 15, 24, 26
Tex.Util.Code §53.002 20

PETITION FOR WRIT OF CERTIORARI

Petitioner Texas Commercial Energy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 413 F.3d 503. (App. 1) Petition for rehearing was denied without opinion. Unpublished order issued July 18, 2005. (App. 2) The opinion of the District Court issued June 24, 2004 and is not reported in F.Supp.2d, 2004 WL 1777597. (App. 3 and 4)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on June 17, 2005, and its orders denying rehearing on July 18. (App. at 1 and 2) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Texas Utility Code §39.158(b) provides that "nothing in this chapter shall be construed to confer immunity from state or federal antitrust laws. This chapter is intended to complement other state and federal antitrust provisions. Therefore, antitrust remedies may also be sought in state or federal court to remedy anticompetitive activities."

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Fifth Circuit upholding a decision of the United States District Court for the Southern District of Texas with respect to the application of the filed rate doctrine to the recently deregulated Texas electric market.

Petitioner believes that the decision of the Fifth Circuit is a far departure from the accepted and usual course of judicial proceedings, and has sanctioned such a far departure from the original intention of the filed rate doctrine, that it is a necessary call for the exercise of this Court's supervisory power. The Fifth Circuit, in a case of first impression, has blindly applied the filed rate doctrine to a new regulatory system that doesn't fit the traditional antiquated mold, and failed to perform the necessary analysis for such. The lack of analysis creates a conflict with the intention of the filed rate doctrine and its application to antitrust law.

The District Court erred by ruling that only the United States Congress can determine the applicability of the filed rate doctrine by amending the Sherman Act, as opposed to the relevant legislative body creating the agency authority, that the limited statutory mandate of the PUCT under PURA is sufficient to give rise to the application of the filed rate doctrine. The application of the filed rate doctrine to the Texas Legislature's choice of private antitrust right of action, rather than PUCT refunds, to remedy anticompetitive behavior is unconstitutional.

The effect of the decision is to allow market participants the ability to manipulate the newly

deregulated electric market with impunity, while unconstitutionally providing no recourse for aggrieved parties.

This case of first impression is about making good on the Texas Legislature's promise that aggrieved parties under PURA will not be left without a remedy. The Legislature's grant of a private right of action to parties aggrieved by antitrust violations to seek redress in the state or federal courts is explicit. Accordingly, the District Court's dismissal and the Fifth Circuit's ruling are in direct contravention of the Legislature's clear mandate that aggrieved parties be able to maintain private rights of action and seek damages for the harm complained of in the case at bar.

This is a lawsuit brought by TCE, operating as a Retail Electric Provider ("REP") and Qualified Scheduling Entity ("QSE") within Texas' deregulated whole sale power market (ERCOT Market"), which is governed by the Public Utility Commission of Texas ("PUCT"). The ERCOT Market is intrastate and contained entirely within Texas, and all of the events in question occurred entirely within the ERCOT Market, under the Texas regulatory structure set forth in the Public Utilities Regulatory Act ("PURA").

TCE began supplying energy to customers in January 2002. TCE grew exponentially in its first six months of business. In early 2003, despite a glut of excess generation capacity in Texas, the ERCOT Market experienced artificially high prices[1] caused by many of

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[1] The Market Oversight Division of PUCT concluded that the market manipulation had increased the price of energy on specific days by two to three times, at an additional cost to

the same market manipulation techniques employed during the California electricity crisis, an explanation of which is helpful to understanding the facts of the case at bar.

In 1996, the California Legislature restructured the California electricity industry with the aim of promoting competition. The state's key legislation, AB 1890, facilitated the divestiture of numerous power plants by the state's investor-owned utilities, except unlike the ERCOT market in Texas, California's grid was not completely intrastate and was subject to FERC's jurisdiction under the Federal Power Act ("FPA"). Market participants thus bought and sold power at FERC approved "market-based rates", which has responsibility under the FPA for ensuring "just and reasonable" rates. In June 2000, wholesale rates in California began spiraling out of control, forcing the state's largest utility to file for bankruptcy. In January 2001, the California Governor declared a state of emergency. The market manipulation in California cost businesses and consumers billions.

Similarly, in late 2002 and in 2003, the California deregulation and the subsequent catastrophic consequences of market manipulation played like a broken record in Texas (except, unfortunately for the lack of remedies in Texas, discussed *infra).*[2] Through a

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the market of $17,000,000, not including damages it did to market participants themselves. As PUCT has no authority to remedy this situation, TCE filed suit pursuant to PURA.

[2] In fact, when the dam broke in California, many of the perpetrators that destroyed the California market made their way to TXU to continue their practices. For example, John Forney, mastermind of the California manipulation, came to work for AEP. Likewise, Holden Salisbury, who

coordinated strategy of overt acts by TXU, prices in the ERCOT Market repeatedly spiked and remained at extraordinarily high levels. Because of higher manipulated costs of energy, TCE was forced to post with ERCOT five-times its normally required collateral. Following months of steady price manipulation, TCE filed for Chapter 11 bankruptcy protection on March 6, 2003, with losses exceeding $300,000,000. Costs to Texas consumers exceeded $1,000,000,000. TCE converted to Chapter 7 last month and this lawsuit is the one remaining asset of the company.

TCE brought suit against 24 defendants in July 2003 for federal and state antitrust violations.[3] TCE seeks state and federal antitrust damages and restitution for harm suffered as a result of TXU's fraudulent market transactions and flagrant monopolization and manipulation of the ERCOT Market. In defense, TXU has asserted "the filed rate doctrine" defense.

The District Court held that the filed rate doctrine barred Petitioner's claims. The court of appeals upheld the District Court's opinion. Neither made the necessary analysis of the filed rate doctrine as it applies to PURA and the facts in this case, a case of first impression in the newly deregulated Texas electric market.

Petitioner is substantially aggrieved as the decisions below have turned the intent of the Texas Legislature on its head, applied an antiquated defense to

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worked under John Forney, came to work for TXU. Forney has been indicted and Salisbury is under investigation by the FBI.

[3] §§1 and 2 of the Sherman Antitrust Act, §15.05(a)-(c) and §15.10 of the Texas Free Enterprise and Antitrust Act ("TFEAA"). TCE also asserted various state causes of action.

a statute it does not fit and has unconstitutionally left Petitioner without a right of recourse.

REASONS WHY THE WRIT SHOULD BE GRANTED

This petition for writ of certiorari should be granted for three principal reasons. First, the District Court erred by ruling that only the United States Congress can determine the applicability of the filed rate doctrine by amended the Sherman Act, as opposed to the relevant legislative body creating the agency authority. Second, in a case of first impression, the limited statutory mandate or the PUCT under PURA is not sufficient to give rise to the application of the filed rate doctrine. Third, application of the filed rate doctrine leaves Petitioner unconstitutionally without a right of recourse.

I. The District Court erred by Ruling That only the United States Congress can Determine the Applicability of the Filed Rate Doctrine by Amended the Sherman Act, as Opposed to the Relevant Legislative Body Creating the Agency Authority.

In contrast to the instant suit, every filed rate doctrine case contains a statutory regulatory scheme with three common denominators:

(1) Actual Tariffs. A statute expressly requires rates to be set via tariffs approved or rejected by the agency, to which the courts defer;

(2) ADM. An agency empowered to administer an expressly statutorily created "alternative damages mechanism" ("ADM") giving aggrieved parties monetary remedies when harmed by unlawful conduct, which mechanism substitutes for the courts; and

(3) Exclusive Jurisdiction. A statute directs the courts to stay out of certain disputes and avoid interfering with the agency's separately created ADM.

TXU does not dispute that PURA dictates whether the filed rate doctrine applies, but nonetheless argues that the filed rate doctrine should be applied under PURA, despite that the filed rate doctrine will leave Plaintiffs unconstitutionally stranded without any right to seek any monetary relief, and despite that the new version of PURA *detariffed* Texas's markets, mandating (i) that "the normal forces of competition" set prices, (ii) "the production and sale of electricity [does not] warrant[] regulation of rates," (iii) "full and fair competition," and (iv) "antitrust remedies" be available in "federal courts" to remedy "anticompetitive activities."[4] Indeed, the PUCT lacks tariff-setting authority, refunding authority, and exclusive jurisdiction over this dispute contesting Defendants' naked restraints on trade. Cases interpreting the Federal Communications Act of 1934, the Interstate Commerce Act and the Federal Power Act provide examples, albeit inapposite examples.

A. The Filed Rate Doctrine is Not a Part Of "antitrust law."

In ruling that only Congress can address the filed rate doctrine's applicability as a defense to both state and federal statutes and common law, and can only abrogate its applicability as a defense thereto by amending the Sherman Act,[5] the District Court and Fifth Circuit erred.

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[4] Tex.Util.Code §§31.001(c), 39.001(a) and (b), 39.158(b) and 35.002.

[5] The District Court relied on *Resolution Trust Corp. v. Miramon*, 22 F.3d 1357 (5th Cir. 1994), which was a

Implicit in the conclusion is an erroneous assumption that the filed rate doctrine is a "part of federal antitrust law."[6] The filed rate doctrine is neither a legislative enactment nor is it a part of "antitrust law." It is not a blanket defense to antitrust statutes, state or federal. The Sherman Act is indeed the "Magna Carta of free enterprise."[7] Petitioner can find no case applying the filed rate doctrine to antitrust cases by looking at congressional intent of the Sherman Act; rather, they all look at the regulatory framework of the industry at issue, i.e,, the ICC, the FPA, the NGA. Here, we must look at PURA.

The filed rate doctrine's applicability to a particular statute or cause of action is dependent upon an examination of statutory construction of the particular regulatory scheme (and thus statute) at issue to determine whether deference should be given to a damages mechanism set under a particular regulatory structure; an analysis the District Court and Fifth Circuit failed to do. To take the District Court's pronouncement to its illogical conclusion would require various federal *and state* statutes, such as the ICA, the Communications Act of 1934, the Texas Insurance Code, or any other

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preemption case involving federal law versus state law. However, when both state and federal antitrust remedies are at issue, a different analysis is applicable, as federal antitrust remedies were not intended to preempt state antitrust laws.

[6] Seeing no amendments to the Sherman Antitrust Act addressing the filed rate doctrine, the District Court concludes that the legislative intent of the United States Congress is that the filed rate doctrine is a valid defense to federal antitrust claims. App. 1.

[7] *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 124 S.Ct. 872 (2004), citing *U.S. v. Toopco Associates*, 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972).

statute to which the filed rate doctrine is applicable being amended via a United States Congressional amendment of the Sherman Act. First, such a scheme would violate federalism principles. It is well-settled that a court cannot find federal preemption of state regulation of activity historically regulated by the states unless Congress has given a "clear statement" of its intent to preempt.[8] In the case at bar the Texas Legislature has authority to implement a regulatory scheme for its intra-state electricity market so long as it does not infringe upon federal statutory enactments, which it has not done in this case.[9]

Under the District Court's ruling, the only means by which the relationship between the Texas Insurance Code and a Texas common law fraud claim could be resolved would be via United States Congressional amendment of the Sherman Act. Moreover, the District Court's ruling that Congress has the unique ability to address the filed rate doctrine's applicability as a defense to both state and federal statutes and common law via amendment of the Sherman Act would result in an incomplete and therefore absurd remedy as t' filed rate doctrine also bars common law claims such as breach of contract, promissory estoppel, and negligent misrepresentation – none of which would be effected by an amendment of the Sherman Act.

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[8] *State of Texas v. United States, et. al.*, 730 F.2d 339 (5th Cir. 1984).

[9] TCE not only alleged federal antitrust claims, but also state antitrust claims. The only reason that federal antitrust law judicial interpretations are arguably applicable to TCE's state antitrust claims in the case at bar is because the Texas Legislature chose to incorporate certain principles in the "harmonizing" provisions of the TEFAA. The Texas Legislature thus likewise has control to narrow the applicability of such judicial interpretations.

This is even more evident in the context of state regulatory schemes that do not infringe upon federal enactments. In particular, the deregulation of the Texas electrical market has statutory provisions that, in effect, address the applicability of the filed rate doctrine to the Texas regulatory scheme. These provisions specifically indicate that the Texas Legislature, within the enactment of its regulatory scheme, intended that the filed rate doctrine not limit access to antitrust remedies. Rather than provide PUCT any retroactive refund authority for intra-state wholesale electricity transactions, the Legislature included a savings clause to ensure that market participants could seek remedy for market power abuses through the federal and state antitrust laws.

TXU, the District Court and the Fifth Circuit rely solely and blindly on a myriad of federal and out-of-state cases related to various courts' adherence to the Supremacy Clause in dismissing federal and state filed cases in favor of the Federal Energy Regulatory Commission's ("FERC's") exclusive jurisdiction provided it by Congress in the Federal Power Act ("FPA"). While TCE therefore has no argument herein concerning the irrelevant application of the "filed rate doctrine" in the context of FERC's exclusive jurisdiction over matters of electric utilities involved in interstate commerce, TCE respectfully submits that all of the cases cited below are inapposite, as the subject matter of this case involves alleged anticompetitive conduct within the context of the intra-state jurisdiction of PURA within Texas.

Just as all the cases cited by TXU almost uniformly invoke Congress' intent to vest exclusive jurisdiction over electric utilities involved in inter-state commerce to FERC as the reason for the invocation of

the "filed rate doctrine," TCE invokes herein the clearly-enunciated decision by the Texas Legislature to create the concurrent application of antitrust remedies in both state and federal courts to defeat TXU's call to dismiss TCE's claims through a blind invocation of the inapplicable and antiquated "filed rate doctrine" here. Instead, the 76th Texas Legislature knew of the previous use of the "filed rate doctrine" to preclude antitrust claims, and decided, as a matter of legislative action and intent, to allow aggrieved entities to seek relief in both state and federal courts for anti-competitive conduct occurring within Texas' deregulated electric utilities market.

Just as TXU's federal and out-of-state cases rely upon Congress' intent to vest exclusive jurisdiction with FERC, this Court should adhere to the Texas legislature's intent to do the opposite – to permit antitrust actions to proceed to address alleged anti-competitive conduct occurring within Texas' intra-state electric utilities markets. As the "filed rate doctrine", at its core, is justified as matter of Congressional intent, its invocation here should be defeated as a result of the clear legislative intent stated by the 76th Texas Legislature in Senate Bill 7 giving rise to the present regulatory structure of the Texas electric utilities market. Moreover, the PUCT has promulgated rules reflecting the legislature's adherence to litigants' right to seek antitrust remedies in state in federal court. As a consequence of the clear legislative intent, TXU's request that this Court deprive TCE of its right to seek antitrust remedies in this Court is inappropriate.

TXU cites a long litany of inapposite cases referencing the filed rate doctrine. However, the filed rate doctrine should not apply here, as the Texas legislature put its desires concerning these plaintiffs'

abilities to seek redress in state and federal court into its legislation: ***"Nothing in this chapter shall be construed to confer immunity from state or federal antitrust laws. This chapter is intended to complement other state and federal antitrust provisions. Therefore, antitrust remedies may also be sought in state or federal court to remedy anticompetitive activities."***[10]

The savings clause bars finding of implied immunity. *Verizon Comm. v. Law Office of Curtis Trinko* opinion is relied upon by TXU but supportive of Petitioner's position. The Supreme Court, Justice Scalia, held that the Telecommunications Act of 1996 had no effect upon the application of traditional antitrust principles, in light of anti-trust specific savings clause which barred the finding of implied immunity.[11] Congress, however, precluded the interpretation that savings clause did not bar immunity by §601(b)(1) of the 1996 Act which contains the savings clause much like the one in the case at bar. The District Court agreed that the PURA section in question should be interpreted in the same manner as the savings clause found in the Telecommunications Act of 1996.

B. The Origins Of The "Filed Rate Doctrine" Were In Congressional Intent To Vest Exclusive Jurisdiction In A Federal Regulatory Agency

The filed rate doctrine began in truth in 1907, but became largely recognized with the Supreme Court, writing through Justice Brandeis, releasing its opinion in

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[10] Tex.Util.Code §39.158(b).

[11] 540 U.S. at 407.

Keogh v. Chicago & NW Ry Co.,[12] where after the Interstate Commerce Commission had found the rates to be "reasonable and nondiscriminatory", the plaintiff brought suit about those very rates under §7 of the Sherman Antitrust Act. The Court held that the case should be dismissed, noting "it is the Commission which must determine whether a rate is discriminatory."[13]

For six decades, the *Keogh* rule was applied over and over again, with the invocation of the Supremacy Clause being the common theme.[14] In 1981, the

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[12] 260 U.S. 156, 163-64, 43 S.Ct. 47, 49-50, 67 L.2d 183 (1922).

[13] *Id.*, at 164, 43 S.Ct. at 50. It is noteworthy that these rates were set by tariff requiring a detailed rate-making process back then – for EACH rate established. While *Keogh* may have been justified with a detailed rate-making regulatory process, it has no place in a deregulated auction environment such as the Texas ERCOT balancing energy services market.

[14] **ICC** (*Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553 (1907) (ICC); *Keogh v. Chicago & NW Ry. Co.*, 260 U.S. 156, 163-64, 43 S.Ct. 47, 49-50, 67 L.Ed2d 183 (1922) (ICC); *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981)(ICC); *Square D v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986) (ICC); *Maslin Industries, U.S., Inc. v. Primary Steel*, 497 U.S. 116, 110 S.CT. 2759, 111 L.ED.2d 94 (1990)(ICC)); **FPA** (*Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251-52, 71 S.Ct. 692, 695, 95 L.Ed. 912 (1951)); **FPA** (*Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962, 106 S.Ct. 2349, 2354-55, 90 L.Ed.2d 943 (1986) (FPA); *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988) (FPA); *California v. FERC, 495 U.S. 488, 110 S.Ct.* 2024, 109 L.Ed. 2d 474 (1990) (FPA); *Entergy Louisiana v. Louisiana Public*

Supreme Court noted in *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*,[15] that "[t]he common rationale of these [filed rate doctrine] cases is easily stated: '[T]here can be no divided authority over interstate commerce, and ... the acts of Congress on that subject are supreme and exclusive.' "[16]

The filed rate doctrine cannot apply to bar aggrieved parties' claims for damages from the state and federal courts unless the statute under which the filed rate doctrine is being applied creates a substitute damages mechanism; this substitute damages mechanism is the underlying thread that ties the filed rate doctrine cases together.[17] *Keogh* is instructive on this issue. *Keogh's* application of the filed rate doctrine thus hinged upon the Court's finding that the regulatory structure at issue in the ICA provided a substitute mechanism for recovery of damages, such that permitting a plaintiff to seek damages under the antitrust act was an "additional remedy" tantamount to double-dipping. The District Court's reliance on *Keogh* was unfortunately misplaced because allowing TCE to seek antitrust damages in court in the instant case would not amount to an "additional remedy," or "double dipping," as unlike the ICA and other statutes at issue in TXU's filed rate doctrine cases, PURA provides no separate

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Service, 539 U.S. 39, 123 S.Ct. 2050, 156 L.Ed.2d 34 (2003) (FPA)); **NGA – Natural Gas Act** (*Arkansas Louisiana Co. v. Hall*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981)); **COM. ACT OF 1934** (*MCI Comm. Corp. v. AT&T*, 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994)).

[15] 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981).

[16] *Id.*, 450 U.S. at 318, 101 S.Ct. at 1131, *citing Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404, 408, 45 S.Ct. 243, 245, 69 L.Ed. 683 (1925).

[17] *See generally, Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

(substitute) damages recovery mechanism under which TCE could have even sought damages. PURA does not grant any refunding powers to PUCT. In fact, instead of setting up a separate damages mechanism, PURA expressly does the opposite for antitrust injuries, incorporating TFEAA's damages-mechanism as PURA's only damages mechanism,[18] which mandates that aggrieved parties have the option to seek their antitrust damages in court.

After considerable legal criticism of the subsequently-named "filed rate doctrine", the Supreme Court was asked to overrule it by the petitioners and the Solicitor General of the United States in *Square D Co. v. Niagara Frontier Tariff Bureau*.[19] The court declined to overrule it, noting that its recent decision in *Carnation Co. v. Pacific Westbound Conference*,[20] had made it "clear that collective ratemaking activities are not immunized from antitrust scrutiny simply because they occur in a regulated industry, and that exemptions from the antitrust laws are strictly construed and strongly disfavored."[21] Instead, the Court in a simple,

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[18] Tex.Util.Code §39.158(b).

[19] 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986) (the Supreme Court held that the FRD would have applied even if Keogh had not first complained to, and been rejected by, the ICC before filing the private antitrust claim, citing *Keogh's* reasoning that the ICA's damages mechanism was intended to substitute for the "antitrust remedy," and thus allowing the plaintiff in *Square D* to proceed with his private antitrust suit still amounted to an opportunity to obtain "an additional remedy," even if the plaintiff had not already attempted to obtain an administrative remedy. *Id.* at 417.

[20] 383 U.S. 213, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966).

[21] *Square D*, 476 U.S. at 421, 106 S.Ct. at 1929; Antitrust exemptions should be narrowly construed, and rarely implied. *See e.g. United States v. Philadelphia Nat'l Bank*,

straightforward decision promoting the importance of *stare decises*, invited Congress to overrule it if it so chose. Justice Friendly, at the time sitting for the Second Circuit Court of Appeals, held in the *Square D* that "[t]he ICA and the Shipping Act differ significantly with respect to the relative powers of the ICC [Interstate Commerce Commission] and the FMC [Federal Maritime Commission] concerning rate regulation. As the Senate Report accompanying the 1961 amendments to the Shipping Act noted, "[w]]hereas **Congress has vested rate control powers** and responsibilities **in Government regulatory agencies concerned with domestic** surface and air **transportation**, it has heretofore given to the maritime regulatory agencies **no similar mandate over international shipping rates**." 760 F.2d 1347, 1362-63 (2d Cir. 1985). In sum, the Court, while conceding that *Keogh* may have been "unwise as a matter of policy", reaffirmed it nonetheless on the ground that Congress had ample opportunity to overturn it but had not done so.

Four years later, in *Maslin Indus., U.S., Inc. v. Primary Steel*,[22] the Court observed that it had invited

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374 U.S. 321, 350-351, 83 S.Ct. 1715, 1734-35, 10 L.Ed.2d 915 (1963)("Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions"); *Midland Telecasting Co. v. Midessa Television*, 617 F.2d 1141 (5th Cir. 1980) cert. denied 449 U.S. 954 (1980). ("Judicial unwillingness to imply an immunity reflects the importance of antitrust principles in the structure of the American economy....Accordingly, antitrust immunity will be implied only if necessary to permit the regulator scheme to function, and then only to the "minimum extent necessary. The starting point for determining the existence of an implied immunity is the intent of Congress").

[22] 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990).

Congress to divest that exclusive authority from the federal agencies, had not done so, and thus continued to apply the doctrine, noting: "Congress has not diverged from this interpretation and we decline to revisit it ourselves."[23] Again, in *MCI Telecommunications Corp. v. AT&T*,[24] the Court, writing through Justice Scalia, invoked Congress' intent as the primary justification for continued application of the doctrine:

> As we noted earlier this Term, there is considerable "debate in other forums about the wisdom of the filed rate doctrine," *Security-Services, Inc. v. Kmart Corp.*, 511 U.S. 431, 440, 114 S.Ct. 1702, 1708, 128 L.Ed.2d 433 (1994), and, more broadly, about the value of continued regulation of the telecommunications industry. But our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1934. For better or worse, the Act establishes a rate-regulation, filed-tariff system for common-carrier communications, and the Commission's desire "to 'increase competition' cannot provide [it] authority to alter the well-established statutory filed rate requirements," *Maslin*, 497 U.S., at 135, 110 S.Ct., at 2770. As we observed in the context of a dispute filed over the filed-rate doctrine more than 80 years ago, "such considerations address themselves to Congress, not to the courts." (citation omitted) [25]

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[23] *Id.*, 497 U.S. at 131, 110 S.Ct. at 2768.

[24] 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994).

[25] *Id.* at 234.

C. The Application Of The "Filed Rate Doctrine" In The Context Of The Federal Power Act

In 1935, Congress enacted the Federal Power Act ("FPA"), in which Congress established the Federal Power Commission[26] to oversee the wholesale transmission and sale of interstate electric power. In doing so, Congress gave the Commission plenary and exclusive jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce."[27] The Act mandated that "every public utility file with the Commission" its rates,[28] and FERC then enacted regulations specifying that no public utility "shall directly or indirectly, demand, charge, collect or receive any rate, charge or compensation... which is different from that provided in a rate schedule required to be on file with the Commission."[29]

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[26] Congress later terminated the Federal Power Commission and has transferred its powers to the Secretary of Energy and the Federal Energy Regulatory Commission ("FERC"). 42 U.S.C. §§ 7151(b), 7172(a), 7291, 7293 (1988).

[27] 16 U.S.C. §824(b).

[28] 16 U.S.C. §824d(c).

[29] 18 C.F.R. §35.1(e). Every interested party had a chance to be heard and make arguments before the rates were set; thus, they could not complain after the fact. Before rates were set, interested parties could object and be heard. By contrast, when market rates are established instantly, such opportunity has vanished. Now, the only opportunity to question "prices" achieved by anti-competitive conduct is to do so after the fact, and the "filed rate doctrine" unreasonably takes away this opportunity. Thus, a Court should look hard for legislative intent to either continue filed rate or to abrogate it in a deregulated market where prices are instantly set by the stroke of a computer.

Given this exclusive jurisdiction granted to the FPC (now FERC), it should not have been unexpected that the Courts would begin to apply the "filed rate doctrine" to interstate electric providers.

Texas' electric power grid was headed toward FERC regulation; however, the decision was made to design the grid to become strictly "intra-state." As a consequence, Texas' electric power system is the only system in the nation not subject to the jurisdiction of FERC. Instead, it is regulated by PURA. In the same way all the filed rate doctrine cases cited by TXU relies upon Congress' intent to vest exclusive jurisdiction over federal power issues to FERC in invoking the filed rate doctrine, this Court should look to the Texas legislature's statutory intent ***not to invoke the filed rate doctrine*** in deciding to permit this action to survive.[30]

II. The Origins of the "Filed Rate Doctrine" Were in congressional Intent to Vest Exclusive Jurisdiction in a Federal Regulatory Agency.

Just as the "filed rate doctrine" arose in the FERC context by courts reviewing Congress' intent, this Court should review both the words and the legislative intent of the Texas Legislature and the bill's authors in deciding whether applying the filed rate doctrine here is appropriate, as well as the agency's rulemaking decisions concerning the availability of antitrust suits to correct anticompetitive conduct. Such a review demonstrates very clearly that the filed rate doctrine should not be applied here to dismiss TCE's claims.

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[30] In its appellate briefing, TXU does not dispute that the Texas legislature, had it chosen to do so, could have repealed the application of the filed rate doctrine.

"The cardinal rule of statutory construction is to ascertain and follow the legislature's intent.[31] We ascertain this intent by looking initially at the language used in the statute.[32] The words in the statute should be interpreted according to their meaning; they are not to be interpreted in an exaggerated, forced or strained manner.[33] Every word of a statute is presumed to have been used for a purpose, and every word excluded must also be presumed to have been excluded for a reason."[34]

Under the pre-Senate Bill 7 regulatory scheme of price regulation, electric utilities were required to file their rates,[35] and therefore, the filed rate doctrine was applied. However, during the initial planning stages toward deregulation, the Legislature included the requirement in 1997 that such charges "not be...anticompetitive."[36] Finally, during Senate Bill 7's 1999 passage, the Legislature added Chapter 39 to the Public Utilities Regulatory Act, a Chapter entitled "Restructuring of Electric Utility Industry." In so doing, the legislature restructured the electric utility industry and will in the future open Texas' retail electric markets to competition. The Supreme Court of Texas characterized 1999 as a year when "the Legislature decided to chart a new course for the provision of

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31 *Citizen's Bank v. First State Bank*, 580 S.W.2d 344, 348 (Tex. 1979).

32 *Jones v. Del Andersen & Assocs.*, 539 S.W.2d 348, 350 (Tex. 1976).

33 *Howell v. Mauzy*, 899 S.W.2d 690, 704 (Tex.App. - Austin 1994, writ denied).

34 *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981).

35 Tex.Util.Code §§32.101; 53.002.

36 Tex.Util.Code §36.007(a).

electric service in Texas."[37] The Court recognized that due to Senate Bill 7, "the relationship among the PUC, utilities, and their customers will dramatically change over the next few year." In its 1999 legislation, the Legislature made it clear that the restructuring provisions of Chapter 39, including its express statement of the availability of antitrust remedies in state and federal court, would control, to the extent that they conflicted with other provisions still in the Act under the old scheme.[38] Thus, the issue arises, what was the Legislature's intent concerning the "filed rate doctrine" and the ability to bring private antitrust actions for conduct alleged to be anti-competitive in a post-Senate Bill 7 Texas?

Senate Bill 7, as codified in Chapter 39 of the Texas Utilities Act, restructured Texas' electric utilities system, and deregulated it. While the legislature did maintain price regulation and filed rates after deregulation with respect to transmission and distribution utilities (the so-called TDSP's), the legislature included no filed rate requirement with respect to the balancing energy services market's capacity auction. Even more importantly, the Legislature expressly provided that the entire chapter was subject to antitrust remedies being sought in either state or federal court.

In deregulating electric energy markets in Texas, the 76th Texas legislature placed throughout the text of

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37 *City of Corpus Christi v. PUCT*, 51 S.W.3d 231, 237 (Tex. 2001).

38 *See* Tex.Util.Code §39.002 ("If there is a conflict between the specific provisions of this chapter and any other provisions of this title, except for Chapters 40 [Municipally-Owned Utilities] and 41 [Electricity Co-Ops], the provisions of this chapter control.").

Senate Bill 7 an intent that nothing should preclude civil antitrust lawsuits to remedy anticompetitive conduct. First, in Tex.Util.Code §17.001(a), the legislature included a customer protection policy: "The legislature finds that new developments in....the production and delivery of electricity, as well as changes in market structure, marketing techniques and technology, make it essential that customers have safeguards against fraudulent, unfair, misleading, deceptive or anticompetitive business practices..." Second, in Tex.Util.Code §17.004, the legislature expressed that "[a]ll buyers of ...retail electric services are entitled to: (1) protection from fraudulent, unfair, misleading, deceptive or anticompetitive practices..." Third, while the legislature directed the commission to "adopt rules relating to certification, registration and reporting requirements for...a retail electric provider or an electric utility..., exempt wholesale generators, and power marketers," it provided that "[t] he rules adopted...shall be consistent with ***and no less effective than federal law...***"[39]

In 1999, "Senate Bill 7" ("SB7") amended PURA to require further restructuring of the wholesale market in conjunction with a transition to competition in retail electric sales. The regulated utilities that had operated as vertically integrated monopolies were required to split into three separate (but potentially still affiliated) business units: an electric generation company, a transmission and distribution utility, and a retail electric provider. Only the transmission and distribution utility ("TDSP") remained subject to traditional rate regulation.

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[39] Tex.Util.Code §17.051(b).

The 76th Legislature clearly communicated throughout the text of SB7 its intent that nothing may preclude civil antitrust lawsuits to remedy anticompetitive conduct in the newly deregulated market.[40] Embracing competition, the Legislature specifically prohibited regulatory authorities from enacting rules or issuing orders "regulating competitive electric services, prices, or competitors."[41]

Contrasting legislative findings in 1997 ***prior*** to SB7 against findings ***at the time*** deregulation was being legislatively achieved by SB7 in 1999 is instructive. In 1997, the 75th Legislature codified its legislative findings (purpose) in §31.001.[42] In 1999, the 76th Legislature codified its legislative findings (purpose) in §39.001.[43]

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[40] Tex.Util.Code §17.001(a)("The legislature finds . . . it essential that customers have safeguards against fraudulent, unfair, misleading, deceptive or anticompetitive business practices..."; §17.004("[a]ll buyers of ...retail electric services are entitled to: (1) protection from fraudulent, unfair, misleading, deceptive or anticompetitive practices...").

[41] Tex.Util.Code §39.001(c).

[42] Tex.Util.Code §31.001(b)("***Electric utilities are by definition monopolies*** in many of the services provided and areas they serve. As a result, ***normal forces of competition*** that regulate prices in a free enterprise society ***do not always operate.")***

[43] Tex.Util.Code §39.001(a)("The legislature finds that the production and sale of electricity is not a monopoly warranting regulation of rates, operations, and services and that the public interest in competitive electric markets requires that, except for transmission and distribution services and for the recovery of stranded costs, electric services and their prices should be determined by customer choices and the normal forces of competition." §39.001(b)(2) Regulatory authorities.... may not make rules or issue orders regulating competitive electric services, prices, or competitors or restricting or conditioning competition except as authorized in this title...")

In 1997 the Legislature defined electric utilities as "by definition monopolies" requiring "rules, policies in principles",[44] in 1999, in stark contrast, the next Legislature deregulated the industry, finding that "prices should be determined by customer choices and the normal forces of competition," and that regulatory authorities ***may not*** make rules regulating prices.[45]

While the 76th Legislature gave the PUCT authority to monitor market power abuses, and to impose civil penalties or administrative penalties up to $5,000 per occurrence,[46] it made it clear that private civil antitrust suits could be pursued as well: "***Nothing in this chapter shall be construed to confer immunity from state or federal antitrust laws. This chapter is intended to complement other state and federal antitrust provisions. Therefore, antitrust remedies may also be sought in state or federal court to remedy anticompetitive activities.***"[47]

The Texas Senate passed the bill that became the S.B. 7, on March 17, 1999, while House passage of S.B. 7, with its amendments, occurred on May 24, 1999. On May 27, 1999, the Senate concurred in the House amendments, and the enrolled version that had passed both the Senate and the House still contained the following language: 39.158(b) "Nothing in this ***chapter*** shall be construed to confer immunity from state or federal antitrust laws. This ***chapter*** is intended to complement other state and federal antitrust provisions. Therefore, antitrust remedies may also be sought in state or federal court to remedy anticompetitive activities."

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44 Tex.Util.Code §31.001.

45 Tex.Util.Code §39.001.

46 *See* Tex.Util.Code §39.157.

47 Tex.Util.Code §39.158(b).

III. Application of the Filed Rate Doctrine Leaves Petitioner Unconstitutionally Without a Right of Recourse.

Courts "must construe a statute in a manner that renders it constitutional if it is possible to do so...."[48] Accepting TXU's arguments would cause PURA to violate the Texas Constitution's "jury-guaranty" and "Remedy-Guaranty."[49]

The Texas Constitution's Remedy-Guaranty provides, "all courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[50] The Texas Supreme Court gave the backdrop against which the Remedy-Guaranty should be interpreted:

> "By enforcing our constitution, we...strengthen federalism. ... Article I, sec. 13['s] wording indicates the high value the drafters ... placed on the right of access to the courts. First, the language is mandatory: "shall be open".... Further, it is all-inclusive: ... there is no emergency exception. ... The open courts provision's history also reflects its significance. It originates from[the] Magna Carta, the great charter of English liberties obtained from King John in 1215: "To none will we sell, to none

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[48] *Glyn-Jones v. Bridgestone/Firestone, Inc.*, 857 S.W.2d 640, 642 (Tex. App.—Dallas 1993, writ granted) *judmt aff'd*, 878 S.W.2d 132 (1994).

[49] *Laney v. Fairview City*, 57 P.3d 1007, 1017, n6 (Utah, 2002) ("The terms "open courts provision" and "remedy guarantee" are used interchangeably [by various courts]....").

[50] TEX. CONST. Art. I §13.

deny or delay, right or justice."[51]

> It "reflect[s] ... concern over the growing powers of corporations...[:]" [O]pen courts or remedies clauses were intended to grant individuals rights to a judicial remedy for...[their protection] from abrogation...by economic interests that could control state legislatures. ... The open courts provision was adopted ... when abuse had generated ... distrust of the legislative branch.... That abuse included misuse of political influence by ... corporate interests, who convinced state legislators to favor private interests through legislative enactments insulating them from the general laws."[52]

Contending that §39.158(b) embodies legislative intent to apply the filed rate doctrine to this case, TXU perversely tries to use §39.158(b) to immunize and further its "anticompetitive activities," the very evil against which the provision intends to protect. But then when boldly contending that the Remedy Guaranty only protects against legislative action, TXU contends that the filed rate doctrine is solely common law and has nothing to do with PURA or the legislature. TXU cannot have it both ways. Moreover, the filed rate doctrine is not common law.[53] If the filed rate doctrine applies, then it

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[51] *LeCroy v. Hanlon*, 713 S.W.2d 335, 339-41 (Tex. 1986) (internal citation omitted).

[52] *Laney* 57 P.3d at 1016-18 (describing the purpose of the various states' constitutional Remedy-Guaranties when interpreting Utah's Open Courts provision, which is the same as Texas's provision) (citations omitted).

[53] *Concord v. FERC*, 955 at F.2d 67, 73 (D.C. Cir. 1992) (The FTD "does not have a life of its own. Its application depends on the underlying statute.").

applies because of PURA, legislation against which the Remedy Guaranty protects. It is important to remember that the "double-dipping" concern was the genesis of the filed rate doctrine in *Keogh* and its progeny. Because the ICC provided a mechanism for recovery of damages from the ICC, seeking an additional antitrust remedy would be "tantamount to double dipping." Here, PUCT has no authority and there is no ability to dip at all, unconstitutionally barring Petitioner from a remedy.

There is no dispute that FERC possesses broad remedial authority to address anti-competitive behavior:

> "The power to order retroactive refunds when a company's noncompliance has been so egregious that it eviscerates the tariff is inherent in FERC's authority to approve a market-based tariff in the first instance. FERC may elect not to exercise its remedial discretion by requiring refunds, but it unquestionably has the power to do so. In fact, if no retroactive refunds were legally available, then the refund mechanism under a market-based tariff would be illusory. Parties aggrieved by the illegal rate would have no FERC remedy; and the filed rate doctrine would preclude a direct action against the offending seller. That result does not comport with the underlying theory or the regulatory structure established by the FPA"[54]

The District Court improperly assumed PUCT has refund authority, misinterpreting a voluntary refund by market participants as ordered by PUCT, when in fact it was not. In fact, PUCT itself has stated that the

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[54] *Lockyer v. FERC*, 383 F.3d at 1016.

"potential profits from market manipulations that the Rule addresses dwarf the penalties that PURA authorizes . . . Significantly, there is no provision under PURA for disgorgement of profits wrongfully gained through market power abuses or deceptive practices."[55]

"The right of trial by jury shall remain inviolate." Tex. Const. art. I §15. Petitioner has a right to have its claims heard by jury because its claims are (i) established actions (or analogous actions to those) that (ii) could be tried to a jury before the enactment of Texas' Constitution in 1876.

CONCLUSION

For the foregoing reasons, the petition fro a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 14, 2005

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[55] PUCT and AG's brief, TXU v. PUCT, No. 03-04-00148-CV (Sept. 7, 2004). In fact, interestingly enough, HB 1777 was proposed this year, which amends PURA to give PUCT the refund authority that FERC has.

APPENDIX

TABLE OF CONTENTS

Appendix A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND DECIDED JUNE 17, 2005 2-13

Appendix B – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND DECIDED JULY 18, 2005 14-16

Appendix C – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS – CORPUS CHRISTI DIVISION DATED AND DECIDED JUNE 24, 2005 17-58

Appendix D – OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS – CORPUS CHRISTI DIVISION DATED AND DECIDED JUNE 24, 2005 59-60

APPENDIX A

United States Court of Appeals

Fifth Circuit
FILED
June 17, 2005
Charles R. Fulbruge III
Clerk

United States Court of Appeals
Fifth Circuit

No. 04-40962

TEXAS COMMERCIAL ENERGY, A TEXAS LIMITED LIABILITY COMPANY

Plaintiff-Appellant

versus

TXU ENERGY, INC; ET AL

Defendants

TXU ENERGY INC; TXU GENERATION SERVICES COMPANY LP; TXU PORTFOLIO MANAGEMENT COMPANY LP, formerly known as TXU Energy Trading Company LP; TXU ENERGY SOLUTIONS MANAGEMENT COMPANY, formerly known as TXU Energy Services Co; AMERICAN ELECTRIC POWER INC; AEP TEXAS CENTRAL COMPANY; AEP TEXAS NORTH COMPANY; AMERICAN ELECTRIC POWER SERVICE CORP; AEP TEXAS COMMERCIAL INDUSTRIAL RETAIL LP;

RELIANT ENERGY INC; RELIANT RESOURCES INC; RELIANT ENERGY ELECTRIC SOLUTIONS LLC; RELIANT ENERGY RETAIL SERVICES LLC; RELIANT ENERGY SOLUTIONS LLC; AUTOMATED POWER EXCHANGE INC; ELECTRIC RELIABILITY COUNSEL OF TEXAS; TEXAS GENCO LP; CENTERPOJNT ENERGY INC; CENTERPOINT ENERGY HOUSTON ELECTRIC LLC; TEXAS INDEPENDENT ENERGY LP; ODESSA-ECTOR POWER PARTNERS LLP; GUADALUPE POWER PARTNERS LLP; TRACTEBEL ENERGY MARKETING, INC.

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas

Before GARZA and BENAVIDES, Circuit Judges.*
EMILIO M. GARZA, Circuit Judge.

Texas Commercial Energy ("TCE"), an energy retailer, appeals the district court's dismissal of its lawsuit against TXU Energy, Inc. ("TXU"), a generator of electric power, and twenty-three other defendants. TCE argues that the district court erred by applying the filed rate doctrine to preclude it from recovering

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* Judge Garwood recused himself after oral argument in this case. As a result, this opinion is being entered by quorum pursuant to 28 U.S.C. § 46.

damages it sustained when TXU allegedly manipulated its market position to create substantial price increases in the short-term energy market.

I

Texas deregulated its energy market in 1999 with the passage of Senate Bill 7. Act of May 27, 1999, 76th Leg., R.S., ch. 405, 1999 Tex. Gen. Laws 2543. Bill 7 amended the Public Utility Regulatory Act ("PURA") and split the state's integrated utilities into three groups: electric generation companies, transmission and distribution companies, and retail electric providers. TEX. UTIL. CODE ANN. § 39.051(b). The statute also gives the Public Utility Commission of Texas ("PUCT") authority to regulate the state's electric grids and to monitor and remedy market power abuses.[1] Specifically, PUCT has broad power to maintain "safe, reliable, and reasonably priced electricity" and to "ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive." TEX. UTJL. CODE ANN. §§ 39.101(a)(1), 35.004(e). PUCT is also empowered to remedy market abuses by "seeking an injunction or civil penalties as necessary to eliminate or to remedy the market power abuse or violation as authorized by Chapter 15, by imposing an administrative penalty as authorized by Chapter 15, or by suspending, revoking, or

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[1] Texas' electrical system is independent from the rest of the United States' which is administered through the Federal Energy Regulatory Commission ("FERC"). PUCT fulfills a similar role as FERC.

amending a certificate or registration as authorized by Section 39.356." TEX. UTIL. CODE ANN. § 39.157(a).

TCE is a retail electric provider that sells electricity to customers in Texas by entering into bilateral agreements with generators and by purchasing electricity through the ancillary Balancing Energy Service ("BES") market. The BES market is a bid-based wholesale market for short-term electricity power. PUCT contracted with a private organization, the Electric Reliability Council of Texas, Inc. ("ERCOT"), to administer the BES market. Under the terms of the contract, ERCOT was required to ensure system reliability, nondiscriminatory access to transmission and distribution systems, access to market information, and clearance of all market transactions. PUCT also created the Market Oversight Division ("MOD") to ensure general compliance with the requirements of PURA. In 2002, MOD required all participants in the Texas electricity market to file an affidavit with PUCT pledging that they would not engage in market manipulation.

In February 2003, during severe winter weather, the price for electricity on the BES market soared. As a result, TCE was forced to pay considerably higher sums for the energy it had to supply its customers. The resulting losses led TCE to meet with MOD and express their concern that the price spikes were the result of anti-competitive bids and market manipulation. TCE alleged that, at the time of the price fluctuations, TXU controlled anywhere from seventy-five to ninety-nine percent of the BES market and that it used its market strength to purposefully withhold energy from the market in order to increase the price. TCE argues that while ERCOT made some attempts to force TXU to rectify the situation, it failed to follow its own protocols.

Due to the mounting losses, TCE was forced to file for Chapter 11 bankruptcy.

TCE filed suit against twenty-four market participants including TXU, its subsidiaries, and ERCOT. According to the complaint, TCE alleges that the defendants violated the federal Sherman Antitrust Act and the Texas Free Enterprise and Antitrust Act ("TFEAA"). TCE also alleges fraud, negligent misrepresentation, breach of contract, defamation, business disparagement, and civil conspiracy. The defendants filed motions to dismiss. After holding a hearing on the motions, the district court dismissed TCE's fraud, negligent misrepresentation, and state and federal antitrust claims on the basis of the filed rate doctrine. The court also dismissed some of the breach of contract and civil conspiracy claims, and denied ERCOT's motion to dismiss the defamation and business disparagement claims. Having dismissed the federal claims, the district court dismissed the entire case, finding that there was no basis for diversity jurisdiction on the remaining state law claims. TCE now appeals the district court's dismissal of its antitrust claims.[2]

II

We review a district court's grant of a motion to dismiss *de novo*. *Martin K Eby Const. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004). A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which

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[2] TCE does not challenge the district court's decision to dismiss their negligent misrepresentation and fraud claims under the filed rate doctrine.

would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The district court held that, even if the defendants had engaged in market manipulation, the filed rate doctrine precluded TCE from recovering for its losses under federal and state antitrust law. The filed rate doctrine bars judicial recourse against a regulated entity based upon allegations that the entity's "filed rate" is too high, unfair or unlawful. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) (filed rate doctrine bars damage action against motor carriers under antitrust laws even though carriers colluded to set artificially high filed rate). The Supreme Court established this doctrine in *Keogh v. Chicago & Northwestern Railway, Co.*, 260 U.S. 156 (1922). In *Keogh*, the Supreme Court held that a shipper could not bring an antitrust action against carriers in connection with tariffs paid because those tariffs had been filed and approved by the Interstate Commerce Commission. *Id.* at 163. The Court reasoned that even if the carriers had conspired to eliminate competition, the shipper could not recover under antitrust law because it could receive a rebate that might give the shipper "preference over his trade competitors." *Id.* Furthermore, the Court held that it was up to the respective governmental agency to determine whether the rates were discriminatory or unlawful, not the courts. *Id.* at 164.

Since *Keogh*, courts have consistently applied the filed rate doctrine in a number of energy cases to preclude lawsuits against companies based on rates that were filed with a government agency. *See, e.g., Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (filed rate doctrine prohibits seller of natural gas to collect a rate different than the one it filed with the Federal Power Commission.); *Tex. E. Transmission Corp. v. Fed.*

Energy Regulatory Comm'n, 102 F.3d 174, 189 (5th Cir. 1996) (natural gas pipeline precluded from retroactively assessing customer rates based on a new and different rate methodology because the prior rates had been filed with a federal agency). "Simply stated, the doctrine holds that any 'filed rate'-that is, one approved by the governing regulatory agency-is per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17,18 (2d Cir. 1994).

III

TCE argues that the district court was erroneous in applying the doctrine because: 1) the legislature clearly intended for aggrieved parties to bring private claims under PURA; 2) wholesale energy rates in the BES market are not filed with PUCT; 3) antitrust exemptions should be narrowly construed; and 4) the filed rate doctrine cannot be applied because PURA does not create a substitute damages mechanism.

A

TCE argues that, under Bill 7, the Texas state legislature expressly intended to allow private antitrust claims to be brought under PURA and that the district court's decision violates "[t] he primary rule in statutory interpretation [—] that a court must give effect to legislative intent." *In re CPDC, Inc.*, 337 F.3d 436, 442 (5th Cir. 2003) (quoting *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378,383 (Tex. 2000)). In support, TCE cites to PURA's savings clause which states that "[nothing in this chapter shall be construed to confer immunity from state or federal antitrust laws. This chapter is intended to complement other state and federal antitrust provisions. Therefore, antitrust remedies may also be sought in state

or federal court to remedy anticompetitive activities." TEX.UTIL. CODE ANN. § 39.158(b).

TCE asserts that the application of the filed rate doctrine violates this provision of the statute by conferring immunity on the defendants. In *Square D Co.*, the Supreme Court rejected this position by explicitly stating that the application of the filed rate doctrine "is far different from the creation of an antitrust immunity." 476 U.S. at 422; *see also Wegoland*, 27 F.3d at 22 ("filed rate doctrine does not leave regulated industries immune from suit under the RICO or antitrust statutes."). Rather, as the Court noted, defendants who engage in anticompetitive activities based on filed rates are "still subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief." *Square D Co.*, 476 U.S. at 422. Moreover, contrary to TCE's assertions, the filed rate doctrine is very much a part of current federal antitrust law. It has been consistently applied as a defense to antitrust actions by various circuits and by the Supreme Court for decades. *Id.* at 423 ("the Keogh rule has been an established guidepost at the intersection of the antitrust and interstate commerce statutory regimes for 6 1/2 decades... [and is] an essential element of the settled legal context in which Congress has repeatedly acted in this area"). Thus, we find that applying the filed rate doctrine, along with other common-law defenses that are normally part of the federal antitrust legal landscape, gives effect to the legislature's intent to have PURA "complement other state and federal antitrust provisions." TEX. UTIL. CODE ANN. § 39.158(b).

Similarly, TCE's state antitrust arguments-that applying the filed rate doctrine would displace provisions set out in the TFEAA, or that the filed rate doctrine as a whole does not apply to the TFEAA-are

misplaced. "[C]ourts have uniformly held... that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies." *Wegoland LTD.*, 27 F.3d at 20; *see also H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir. 1992) ("the filed rate doctrine applies whether the rate in question is approved by a federal or state agency"); *Taffet v. Southern Co.*, 967 F.2d 1483 (11th Cir. 1992); *Korte v. Allstate Ins. Co.*, 48 F.Supp.2d 647 (E.D.Tex. 1999). Moreover, state antitrust claims do not need to be addressed separately because the TFEAA explicitly "mandates that its provisions be interpreted in harmony with federal antitrust law." *Johnson v. Hosp. Corp. of Am*, 95 F.3d 383, 391 n.7 (5th Cir. 1996). Thus, the filed rate doctrine applies with equal force to TCE's state antitrust claims.[3]

B

TCE contends that the filed rate doctrine is inapplicable because PURA does not require rates in the BES market to be filed with PUCT, which does not set or approve these rates. We agree with the approach taken by other circuits who have addressed this issue in the context of rates filed with PUCT's federal counterpart, FERC. In *Town of Norwood, Massachusetts v. New England Power Co.*, the First

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[3] TCE also contends that the district court erred by ruling that only the U.S. Congress has the authority to determine the applicability of the filed rate doctrine and that the doctrine may only be abrogated through an amendment to the Sherman Act. The defendants, however, "do not dispute that the Texas legislature, had it chosen to do so, could have repealed the application of the filed rate doctrine to cases brought under the TFEAA." Since we conclude there is no evidence that the state legislature sought to eliminate this doctrine from state antitrust suits, this argument is moot.

Circuit concluded that the filed rate doctrine applied to market-based energy rates because FERC was "responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review." 202 F.3d 408, 419 (1st Cir. 2000). The Ninth Circuit echoed this view, noting that while FERC had waived many requirements that it had applied under a cost-based system, the filed rate doctrine continued to apply to market-based energy rates because the agency continued to "oversee wholesale electricity rates... by reviewing and approving a variety of documents filed by [market actors]." *Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.*, 384 F.3d 756, 760-61 (9th Cir. 2004). Similarly, under Bill 7, PUCT is required to ensure "safe, reliable, and reasonably priced electricity" and "that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive." TEX. UTIL. CODE ANN. § 39.101 (a)(1), 35.004(e). PUCT also requires electricity generators to file detailed information to assess market power and even a market power mitigation plan for those generators that control more than 20% of the electricity market in a specific region. TEX. UTIL. CODE ANN. § § 39.155-156. Accordingly, PUCT's oversight over the market is sufficient to conclude that the BES energy rates are "filed" within the meaning of the filed rate doctrine.

C

TCE argues that the filed rate doctrine should not be applied because antitrust exemptions should be

narrowly construed. It morphs this general assertion into a more specific allegation that its claims are exempt from the filed rate doctrine under the "competitor exception." The competitor exception, which has never been recognized by this court or the Supreme Court, holds that "an anticompetitive practice embodied in a [filed] tariff may [still] violate the antitrust laws if it... impacts upon competitors as opposed to customers." *City of Groton v. Conn. Light and Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *see also Utilimax.com. Inc. v. PPL Energy, LLC*, 378 F.3d 303, 307 (3d Cir. 2004) (competitor exception exists "because competitors are not the intended beneficiaries of that rule of public utility regulation") (quoting *Essential Communications Sys. v. Am. Telephone & Telegraph Co.*, 610 F.2d 1114, 1121 (3d Cir. 1979)). *But cf. Pinney Dock & Transp. Co. v. Penn Central Corp.*, 838 F.2d 1445-47 (6th Cir. 1988) (rejecting competitor exception).

Assuming, without deciding, that such an exception exists, we find that the consumer exception is not applicable to this case. TXU has affiliated retail electric providers as part of its subsidiaries. However, TCE is not a competitor to TXU in the context of this case because all of it claims of market manipulation are focused solely on TXU's actions as an electric generation company. Thus, TCE did not err in refusing to apply the exception.

D

Finally, TCE argues that the filed rate doctrine is inapplicable because PURA did not create a "substitute mechanism for the recovery of damages." It also alleges that the "implication doctrine" warrants reversal and that the application of the filed rate doctrine violates the state constitution. ICE failed to raise these arguments before

the district court. Accordingly, they are waived. *Horton v. Bank One, NA.*, 387 F.3d 426, 435 (5th Cir. 2004).

IV

For the above stated reasons, we AFFIRM the district court's judgment.

APPENDIX B

U.S. COURT OF APPEALS
FILED
JUL 18 2005
Charles R. Fulbruge, III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-40962

TEXAS COMMERCIAL ENERGY, A TEXAS LIMITED LIABILITY COMPANY

Plaintiff – Appellant

v.

TXU ENERGY INC; ET AL

Defendants

TXU ENERGY INC; TXU GENERATION SERVICES COMPANY LP; TXU PORTFOLIO MANAGEMENT COMPANY LP, formerly known as TXU Energy Trading Company LP; TXU ENERGY SOLUTIONS MANAGEMENT COMPANY, formerly known as TXU Energy Services Co; AMERICAN ELECTRIC POWER INC; AEP TEXAS CENTRAL COMPANY; AEP TEXAS NORTH COMPANY; AMERICAN ELECTRIC POWER SERVICE CORP; AEP TEXAS COMMERCIAL INDUSTRIAL RETAIL LP; RELIANT ENERGY INC; RELIANT RESOURCES

INC; RELIANT ENERGY ELECTRIC SOLUTIONS LLC; RELIANT ENERGY RETAIL SERVICES LLC; RELIANT ENERGY SOLUTIONS LLC; AUTOMATED POWER EXCHANGE INC; ELECRIC RELIABILITY COUNSEL OF TEXAS; TEXAS GENCO LP; CENTERPOINT ENERGY INC; CENTERPOINT ENERGY HOUSTON ELECTRIC LLC; TEXAS INDEPENDENT ENERGY LP; ODESSA-ECTOR POWER PARTNERS LLP; GUADALUPE POWER PARTNERS LLP; TRACTEBEL ENERGY MARKETING INC

Defendants – Appellees

Appeal from the United States District Court for the Southern District of Texas, Corpus Christi

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ON PETITION FOR REHEARING EN BANC

(Opinion 6057/ 5 Cir., _____, F.3d _____)

Before GARZA and BENAVIDES, Circuit Judges .*

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc

as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor ((Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/ Emilio M. Garza
United States Circuit Judge

Judges King and Wiener did not participate in the consideration of the rehearing en banc.

*Judge Garwood recused himself after oral argument in this case.

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

United States District Court
Southern District of Texas
ENTERED

JUNE 24 2005

Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

TEXAS COMMERICAL ENERGY	§	
	§	
Plaintiff	§	
	§	C.A. NO. C-039-249
vs.	§	
	§	
TXU ENERGY, INC., et al..,	§	
	§	
Defendants		

ORDER GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS

On this day came on to be heard: (1) "Defendant Electric Reliability Council of Texas, Inc.'s Notion to Dismiss Second Amended Complaint, or, in the Alternative, to Stay Proceedings," (2) "TXU Defendants' Notion to Dismiss TCE's Second Amended Complaint and Brief in Support," (3) "Texas Getco Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint and Brief in Support," (4) "Defendants TECO EnergySource, Ind. and Frontera Generation L.P.'s Motion to Dismiss Plaintiff's Second Amended Complaint and Brief in Support," (5) "American Electric

Power Defendants' Motion to Dismiss the Second Amended. Complaint and Memorandum in Support," (6) "Defendant APX's Notion to Dismiss the Second Amended Complaint and Brief in Support," (7) "TIE Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint and Brief in Support," (8) "Reliant Resources Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint and Supporting Memorandum," (9) "Defendant Tractebel. Energy Marketing, Inc.'s Motion to Dismiss Second Amended Complaint and Memorandum in Support," and all corresponding responses and replies. For the reasons stated below, this Court GRANTS these motions in part and DISMISSES Plaintiff's Second Amended Complaint.

I. JURISDICTION

This Court has federal question jurisdiction over this antitrust action pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

II. FACTS AND PROCEEDINGS

Plaintiff Texas Commercial Energy ("TCE") began selling electric power to retail customers in Texas in January 2002. Initially, TCE entered into bilateral contracts with wholesale providers of electricity to obtain the electric power it sold in the consumer market. However, TCE increasingly relied on the Balancing Energy Service ("BES") market, a bid-based market for short-term power, to meet its electricity needs. In early 2003, prices in the BES market for electricity increased substantially, and as a result, TCE sustained extensive losses before eventually declaring bankruptcy in March 2003. TCE claims that Defendants contributed to the rise

in BES market prices through federal and state antitrust violations, fraud, negligent misrepresentation, breach of contract, defamation, business disparagement, civil conspiracy, and malicious and willful/flagrant conduct.

A. REGULATORY BACKGROUND

The state of Texas operates an independent and self-contained electric production and transmission grid that serves nearly 85 percent of the state. The Federal Energy Regulatory Commission ("FERC") does not regulate Texas' independent electric grid and electric utility companies operating in the Texas electricity market are exempt from the Federal Power Act. The Public Utility Commission of Texas ("PUCT") regulates the Texas electric and transmission grid.

Historically, electric power in Texas was generated and sold by integrated electric utilities that supplied specific geographic areas, and retail rates for electricity were set by the state. But in 1999, the Texas Legislature, with the passage of Senate Bill 7, amended the Public Utility Regulatory Act ("PU1.A"), and began the deregulation of the Texas electricity market. The law required that rates for electric power in Texas be set by a competitive market, and called for each integrated electric utility to partition itself into three companies: (1) a Power Generation Company ("PGC"), (2) a Transmission and Distribution Provider ("TDSP"), and (3) a Retail Electric Provider ("REP":). Senate Bill 7 did not require a full divestiture by each electric utility, but each of the three resulting companies was required to be operated by separate management. The Texas Legislature also granted PUCT jurisdiction over the Texas electricity market.

ERCOT, under a contract with PUCT, is the Independent System Operator ("ISO") of the Texas electricity market, and is charged with insuring (1) system reliability, (2) nondiscriminatory access to transmission and distribution systems, (3) access to market information, and (4) clearance of all market transactions. The ERCOT protocols, which are created and adopted by the ERCOT board, provide the framework for the administration of the Texas electricity market. These protocols divide participants in Texas' wholesale electricity market into three categories: (1) Load Serving Entities ("LSE"), (2) Qualified Scheduling Entities ("QSE"), and (3) Resource Entities ("RE"). LSEs (which include REPs, municipal electric utilities, and co-op electric utilities) sell electricity, REs (which include PGCs) generate electricity, and QSEs serve as intermediaries between LSEs and REs. QSEs are responsible for submitting both (1) schedules of procured energy for LSEs to ERCOT and (2) resource plans for REs to ERCOT. In addition, QSE's must possess either an investment grade credit rating or post collateral with ERCOT in the form of letters of credit or cash equivalents.

Prior to November 2002, the ERCOT protocols required that QSEs submit a "Balance Schedule" demonstrating that the scheduled generation of the REs that a QSE represents is equal to the retail obligations of the LSEs that the QSE represents However, on November 1, 2002, ERCOT implemented the Relaxed Balancing Schedules protocol. This new protocol eased restrictions in the Texas electric market by eliminating the requirement that the scheduled generation of a QSE match its obligations in the retail power market. This revision was designed to increase con-petition in the market by allowing REPs to also serve their. retail load requirements through purchases in the BES market.

The wholesale electricity market in Texas is for both electric power and electric capacity, both of which are available through (1) bilateral agreements among market participants and (2) the BES market. Forward power contracts for future electricity are available only through bilateral agreements, and bilateral agreements are the only source of (1) short-term, one-day to one-month, and (2) long-term, over one-month wholesale purchases. The BES market is a market for same day purchases made in fifteen-minute intervals. Prices in the BES market are capped at $1,000.00 per NWh.

In addition, the ERCOT wholesale market is divided into a number of Congestion Zones ("CZ"). The geographic area of each CZ is re-determined each year, and is established according to three factors: (1) transmission capacity, (2) generation capacity, and (3) electricity demand. Each CZ participates in both the bilateral market and the BES market. Both bilateral market prices and BES market prices are separately quoted for each of the Us. Before 2004, there were four Us in Texas; a fifth CZ was added in 2004.

Electric capacity, an Ancillary Service, is a critical component of the wholesale market, and each LSE is required to supply reserve capacity, an Ancillary Service Requirement. Ancillary Services are purchased either through (1) bilateral agreements with other market participants, or (2) directly through ERCOT in the Ancillary Services market, a bid-based market. In both the BES market and the Ancillary Services market, ERCOT serves as an intermediary, matching offers and bids. A REP can buy or sell energy on the BES market as the need arises to satisfy its retail obligations. ERCOT also administers a day-ahead capacity market.

Senate Bill 7 requires that PUCT monitor and remedy market power abuses. PUCT, through injunctions, fines, and the revocation of the right to participate in the market, possesses the authority to punish those who abuse their market power. PUCT also created the Market Oversight Division ("MOD") to ensure compliance with the statutory requirements of the amended PURA. The MOD itself does not possess decision-making power, but reports directly to PUCT. As part of its compliance activities, in June 2002 the MOD required all participants in the Texas electricity market to file an affidavit with PUCT pledging that they would not engage in market manipulation. These affidavits were a direct response to market manipulation that occurred during August 2001 as a result of improper scheduling practices. The MOD also required market participants to return the $30,000,000.00 obtained as a result of these improper practices.

B. FACTUAL BACKGROUND

TCE began operating as a REP in the State of Texas on January 1, 2002. As a REP, TCE purchased energy and electric capacity from other market participants, and then sold this energy directly to retail customers. Initially, TCE purchased its supply of energy through a bilateral contract with Bryan Texas Utilities. However, on June 20, 2002, TCE became a certified QSE, and began to both purchase electric power directly from ERCOT in the BES market and self-schedule bilateral purchase agreements for power in the wholesale market.

During January 2003, TCE noted that the percentage of electricity in the ERCOT-controlled electric market supplied by the DES market began to rise. During January and February 2003, TCE regularly

observed price spikes in the BES market that were three to five times the price of day-ahead power. Concerned about these observations, TCE met with the NOD, and alleged that both anticompetitive bids and manipulation of scheduled generation drove prices in the BES market to $241.15 per MWh on January 25, 2003.[4] On that day, the price for day-ahead power was $40.30 per MWh. As a result of these price spikes, TCE paid higher prices in the BES market, and was forced to withdraw credit-based collateral from its bilateral partners to meet its increasing collateral requirements with ERCOT.

TCE claims that these high prices occurred as a result of market manipulation by Defendants, and notes that TXU controlled 75 percent of the BES market on February 24, 2003, 99 percent of the BES market on February 25, 2003, and 85 percent of the BES market on February 26, 2003. On February 24, 2003, TCE contends that Defendants implemented a squeeze on the market for short-term and BES energy. The BES market price for the 8:30 a.m. interval initially cleared $990.01 per MWh before being recalled from the market. Then at 6:00 p.m., the price for BES energy cleared $990.01 per MWh for ten intervals. TCE alleges that on February 25, 2003, Defendants TXU and Reliant, despite possessing excess generation capacity, withheld energy from the market in order to manipulate BES market prices. At 7:00 a.m. on February 25, 2003, the BES market ran out of offers, and the market-clearing price for energy ("MCPE") was again $990.00 per MWh. As a result, at 7:30 a.m., ERCOT issued a market advisory and

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[4] TCE alleges that prices spiked to $241.15 per MWh on January 25, 2003 (SAC J 186), but then later alleges that prices rose to $273.64 per N1h at 10:30 a.m. on January 25, 2003. (SAC & 191.)

requested additional up-balancing bids in an effort to provide more electricity in the BES market. TCE contends that throughout the day, ERC)T gave several verbal dispatch instructions to Defendant TXU to raise its level of electric power output into the system. TCE alleges that these verbal instructions failed to follow ERCOT protocols requiring ERCOT to identify the specific generation unit of plant that is to be raised or lowered. TCE also contacted the Chief Operating Officer ("COO") of ERCOT, and requested an explanation for the price spikes in the BES market that morning. ERCOT's COO could not explain the price spikes given that generation and load forecasts were correct, a weather emergency had not been declared, there were no natural gas curtailments, the transmission system suffered from no operational problems, and there were no generation unit outages.

During the week of February 25, 2003, with the rise in BES market prices, TCE was forced to increase its posted collateral with ERCOT from $16,200,000.00 to approximately $24,000,000.00. In addition, to have complied with ERCOT protocols when the invoice for the last week of February was to come due in March 2003, TCE would have had to increase its collateral with ERCOT from approximately $24,000,000.00 to $102,000,000.00. On February 25, 2003, TCE began to contact other market participants in attempt to sell all or part of its customer portfolio. TCE obtained Confidentiality Agreements from these contacted market participants, and alleges that several Defendants violated their Confidentiality Agreements by distributing sensitive and proprietary financial information in an effort to defame and disparage TCE.

On March 3, 2003, the MOD issued "Report on February 24-26, 2003 Balancing Energy Price Spikes,"

and concluded that market manipulation had increased the price of energy in the BES market by two to three times, at an additional cost to the market of $17,000,000.00. During this week, ERCOT agreed to give TCE until March 6, 2003 to post additional collateral. Then on March 4, 2003, ERCOT offered to reduce TCE's credit requirement to roughly $59,000,000.00. However, on March 5, 2003, despite ERCOT's agreement to wait until March 6, 2003, ERCOT tendered TCE's Letters of Credit for payment. On March 6, 2003, TCE filed for Chapter 11 bankruptcy and requested a Temporary Restraining Order ("TRO") to prevent ERCOT from drawing upon its Letters of Credit.

On March 7, 2003, TCE and ERCOT agreed to the terms of an injunction during the hearing for the TRO. The agreement provided that TCE transfer customers representing 80 percent of its revenue to other REPs participating in the Texas electricity market. In return, ERCOT agreed to release TCE's Letters of Credit and assist TCE in collecting its accounts receivable. In addition, during a March 10, 2003 meeting with representatives of participants in the Texas electricity market, two additional requirements were incorporated into the agreement: (1) TCE would no: be allowed to purchase more than 10 percent of its energy requirements in the BES market and (2) the largest of TCE's released customers would be placed on Provider of Last Resort ("POLR") rates.[5] TCE alleges that the second additional requirement is a violation of PUCT rules.

In late March 2003, the Chief Executive Officer ("CEO") of ERCOT issued a number of public

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[5] POLR rates are indexed to the MCPE of the BES market.

statements about TCE. TCE alleges that these statements violated ERCOT protocols by releasing confidential financial and business information. In addition, TCE contends that these statements were false and intentionally misleading.

In a report issued on May 19, 2003, the MOD reported that "bidders using the APX QSE and Mirant 'acknowledged that their extreme bids did not reflect production costs during the weather event, but claimed that the sporadic windfall revenues were intended to improve the long-term profitability of a plant.'" (Pl.'s Second Amend. Compl. ("SAC") & 292.) on January 27, 2004, the MOD published "Staff Inquiry into Allegations made by Texas Commercial Energy regarding ERCOT Market Manipulation." TCE alleges that this report supports its allegations of market manipulation. The MOD continues to investigate TCE allegations of market manipulation.

C. PROCEDURAL BACKGROUND

TCE filed its Second Amended Complaint ("SAC") on February 3, 2004. In its SAC, TCE sues twenty-four defendants that can be classified into ten groups: (1) TXU Energy, Inc., TXU Generation Services Company, L.P., TXU) Portfolio Management Company, L.P., and TXU Energy Solutions Management Company (collectively the "TXU Defendants"); (2) American Electric Power, Inc., AEP Texas Central Company, AEP Texas North Company, American Electric Power Service Corp., and AEP Texas Commercial Industrial Retail, L.P. (collectively the "AEP Defendants");[6] (3)

[6] The AEP Defendants contend that TCE's Bankruptcy Plan, & 4.4.1(11), dismissed AEP Texas Central Company and

CenterPoint Energy, Inc., CenterPoint Energy Houston Electric, L.L.C., and Texas Genco, L.P. (collectively the "Texas Genco Defendants");[7] (4) Reliant Resources, Inc., Reliant Energy Electric Solutions, L.L.C., Reliant Energy Retail Services, L.L.C., and Reliant Energy Solutions, L.L.C. (collectively the "Reliant Defendants-);[8] (5) Automated Power Exchange, Inc. ("APX") ; (6) the Electric Reliability Counsel of Texas ("ERCOT") ; (7) TECO Energy Source, Inc. ('9ES"); (8)

AEP Texas North Company from this action. (AEP's Reply at 3 n.1.)

[7] In its Response to Defendants' Motions to Dismiss, TCE states that it "respectively agrees with Centerpoint's argument that TCE's bankruptcy counsel, Harlin Womble, apparently released Centerpoint during the bankruptcy proceedings. Accordingly, TCE agrees with Centerpoint that it should be dismissed." (Pl.'s Resp. to Def.'s Not. to Dismiss at 140 n.511.) However, TCE fails to state which one of the two CenterPoint companies is to be dismissed. In its Reply to TCE's Response to Defendants' Motions to Dismiss, the Texas Genco Defendants state that the company in question is CenterPoint Energy Houston Electric, L.L.C. (Def.'s Reply at 2.)

[8] In its SAC, TXU collectively refers to CenterPoint Energy, Inc., Centerpoint Energy Houston Electric, L.L.C., Texas Genco, L.P., Reliant Resources, Inc., Reliant Energy Electric Solutions, L.L.C., Reliant Energy Retail Services, L.L.C., and Reliant Energy Solutions, L.L.C. as the "Reliant Defendants." However, the Texas Cenco Defendants and the Reliant Defendants contend that they are separate entities and filed separate motions to dismiss. As a result, this Order will also refer to the Texas Genco Defendants and the Reliant Defendants separately. Therefore, whenever TCE, in its SAC, refer; to the Reliant Defendants, this Court will assume that TCE is referring to both the Texas Genco Defendants and the Reliant Defendants.

Texas Independent Energy, L.P., Odessa-Ector Power Partners, L.L.P., and Guadalupe Power Partners, L.P. (collectively the "TIE Defendants"); (9) Frontera Generation L.P. ("Frontera"); and (10) Tractebel Energy Marketing, Inc. ("Tractebel"). In its SAC, TCE alleges violations of §5 1 and 2 of the Sherman Antitrust Act, § 15.05(a)(c) and S 15.10 of the Texas Free Enterprise and Antitrust Act ("TFEAA"), fraud, negligent misrepresentation, breach of contract, defamation, business disparagement, civil conspiracy, and malicious and willful/flagrant conduct.[9]

ERCOT filed "Defendant Electric Reliability Council of Texas, Inc.'s Motion to Dismiss Second Amended Complaint, or in the Alternative, to Stay Proceedings," on March 15, 2004. The TXU Defendants filed their Motion to Dismiss on March 15, 2004. The Texas Genco Defendants, Frontera, TES, the AEP Defendants, APX, the TIE Defendants, the Reliant Defendants, and Tractebel filed their Motions to Dismiss on March 16, 2004. TCE filed "TCE's Response to Defendants' Motions to Dismiss and, in the Alternative, Motion for Leave to Amend" on April 15, 2004.[10] The Court held a hearing on the motions on May 20, 2004. This Court now considers the motions.

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[9] In its SAC, TCE references § 1, 2, 3 and 13a of the Sherman Antitrust Act. (SAC & 337.) In its response, TCE clarifies that it is asserting only § 1 and 2 Sherman Act claims. (Pl.'s Resp. at 76 n.253.)

[10] This Court struck TCE's response on April 27, 2004. However, the Court is aware of TCE's arguments and has fully addressed them herein TCE refiled its response on April 28, 2004.

III. DISCUSSION

A. MOTION TO DISMISS

Rule 12(b) (6) of the Federal Rules of Civil Procedure authorizes the court to dismiss a claim on the basis of dispositive law. Neitzke v Williams, 490 U.S. 319, 326, 109 S.Ct. 1827, 1832 (1989). When ruling on a 12(b) (6) motion to dismiss, the Court must accept the plaintiff's factual allegations as true, and view these allegations in a light most favorable to the plaintiff. Capital Parks Inc. v S.E Adver. & Sales Sys., 3) F.3d 627, 629 (5th dr. 1994). In a 12 (b) (6) motion, the Court should not look beyond the pleadings. McCartney v First City Banc 970 F.2d 45, 47 (5th Cir. 1992). A 12(b)(6) motion should not be granted "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which entitle him to relief." Coneley v Gibson 335 U.S. 41, 45-46, 78 S.Ct. 9, 102 (1957); Mitchell v McBryde 944 F.2d 229, 230 (5th Cii. 1991). The question before the Court in examining a Rule 12(b)(6) motion is whether the plaintiff's complaint states any valid claim for relief. Coneley v Gibson 335 U.S. 41, 45-46, 711 S.Ct. 99, 102 (1957); Lowrey v Texas A&M Univ. Sys. 117 F.3d 242, 247 (5th Cir. 1997). Since federal courts simply require "notice pleading," the Court construes Plaintiff's pleading liberally, and lack of detail does not constitute a sufficient ground to dismiss a complaint under Rule 12(b)(6). Strauss v City of Chicago 7f0 F.2d 765, 767 (7th Cir. 1985).

B. FEDERAL ANTITRUST CLAIMS

In its SAC, TCE alleges that Defendants violated § 1 and 2 of the Sherman Antitrust Act. Specifically,

TCE alleges that the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel violated the Sherman Antitrust Act y engaging in economic withholding, physical withholding, and market manipulation. TCE further alleges that the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, and the Reliant Defendants violated the Sherman Antitrust Act by exercising monopoly power, attempting to monopolize, and/or conspiring to monopolize. Defendants move to dismiss TCE's federal antitrust claims under the filed rate doctrine.

1. The Sherman Antitrust Act Generally

a. Section 1 of the Sherman Antitrust Act

Section 1 of the Sherman Act states that "[e very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. In order to recover under § 1 of the Sherman Act, a 'plaintiff must prove (1) the existence of an agreement (2) which unreasonably restrains trade (3) to the damage of the plaintiff.' J.T Gibbons Inc. v Crawford Fitting Co. 704 F.2d 787, 791 (5th Cir. 1983). "Section one applies only to concerted action; unilateral conduct is excluded from its purview." Johnson v. Hosp. Corp. of Am. 95 F.3d 383, 392 (5th Cir. 1996). To prove a conspiracy or concerted action, the plaintiff must prove that the conspirators had a "conscious commitment to a common scheme designed to achieve an unlawful objective." Spectator's Communication Network v Colonial Country Club, 253 F.3d 215, 220 (5t Cir. 2001)

b. Section 2 of the Sherman Antitrust Act

Section 2 of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony ...." 15 U.S.C. § 2. This section of the Sherman Act denounces three actions: "monopolization, attempt to monopolize, and conspiracy to monopolize." N. Mississippi Communications Inc. v Jones, 792 F.2d 1330, 1335 (5t Cir. 1986)

Under § 2 of the Sherman Act, the offense of monopoly consists of two elements: "the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Alcatel USA Inc. v DGI Technologies Inc, 166 F.3d 772, 781 (5th Cir. 1999). Specifically, the monopoly power element concerns the "power to control prices or exclude competition." Stewart Glass & Mirror Inc. v U.S Auto Glass Disc Ctrs. Inc, 200 F.3d 307, 315 (5th Cir. 2000).

An attempted monopoly in violation of Section 2 consists of three elements: "(1) that the defendant engaged in predatory or exclusionary conduct, (2) that the defendant possessed the specific intent to monopolize, and (3) that there was a dangerous probability that the defendant would succeed in his attempt." Bell Atl. Corp. v AT&T Corp. 339 F.3d 294, 302 (5th Cir. 2003).

A conspiracy to monopolize can be established only through proof of "(1) the existence of specific intent

to monopolize; (2) the existence of a combination or conspiracy to achieve that end; (3) overt acts in furtherance of the combination or conspiracy; and (4) an effect upon a substantial amount of interstate commerce." Stewart Glass & Mirror Inc, 200 F.3d at 316.

c. Private Causes of Action

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides a private right of action to enforce the Sherman Act and requires a plaintiff to seek recovery for injury "in his business or property." Dillard v Merrill Lynch 961 F.2d 1148, 1159 (5th Cir. 1992) . In order to show standing, the private claimant must demonstrate injury to business and property of a type that antitrust laws were intended to prevent. Id. Pleadings need not explain how the injury occurred; that the claimant sustained injury to business or property is a sufficient allegation. Id.

Private antitrust liability under Section 4 of the Clayton Act requires the showing of (1) a violation of the antitrust laws, (2)
that it was the defendant's conduct that actually caused injury to his business or property, and (3) some indication of the amount of damage. Bell Atl. Corp. 339 F.3d at 302; Nichols v. Mobile Bd. of Realtors Inc. 675 F.2d 671, 675 (5th Cir. 1982). The plaintiff need only provide "a just and reasonable estimate of the damage based on relevant data." Bell Atl. Corp., 339 F.3 at 303.

2. The Filed Pate Doctrine Generally

The filed rate doctrine "bar[s] antitrust recovery by parties claiming injury from the payment of a filed rate for goods or services." County of Stanislaus v. Pac. Gas and Elec. Co., 114 F.3d 858, 862 (9th Cir. 1997)

(holding that the filed rate doctrine barred federal antitrust price fixing claims brought under § 1 of the Sherman Antitrust Act) ; see also Square D Co. v. Niagara Frontier Tariff Bureau Inc. 476 U.S. 409, 424, .06 S.Ct. 1922, 1931 (1986) (holding that the filed rate doctrine barred federal antitrust claims brought under § 1 of the Sherman antitrust Act); Town of Norwood Massachusetts v New England Power Co. 202 F.3d 408, 419 (18t Cir. 2000) (holding that the filed rate doctrine barred federal antitrust claims brought under §§ 1 and 2 of the Sherman Antitrust Act). The doctrine "holds that any filed rate -- that is, one approved by the governing regulatory agency -- is per se reasonable and unassailable in judicial proceedings brought by ratepayers." Wegoland Ltd v NYNEX Corp. 27 F.3d 17, 18 (2 Cir. 1994). In other words, "the filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable." Id. Moreover, "application of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's; conduct or the possibility of inequitable results." Marcus v. AT&T Corp. 138 F.3d 46, 58 (2nd Cir. 1998).

One legal scholar traces the Supreme Court's analysis of filed rates to 1906 when the Court reasoned that the Interstate Commerce Act had the purpose "to secure equality of rates as to all and to destroy favoritism." Jim Rossi, Lowering the Filed Tariff Shield Judicial Enforcement for a Deregulatory Era 56 VANO. L. REV. 1591, 1599 (Nov. 2003) (quoting New York, New Haven & Hartford R.R. v. Interstate Commerce Comm'n, 200 U.S. 361 (1906). The Supreme Court first articulated the filed rate doctrine as a defense to antitrust liability in Keogh v Chicago N.W Ry. Co. 260 U.S. 156, 43 S.Ct. 47 (1922). In Keogh the plaintiff alleged that shipping rates filed by the defendant interstate freight

carriers with the Interstate Commerce Commission ("ICC") were fixed at arbitrary and unreasonable high levels as a result of a conspiracy in violation of § 7 of the Anti-Trust Act of July 2, 1890. Keogh, 260 U.S. at 159-60. The Supreme Court held that since the shipping rates in question had been filed with and approved by the ICC, the plaintiff failed to state a cause of action under the Anti-Trust Act. Id. at 162.

In rejecting the plaintiff's antitrust claim, the Court in Keogh articulated a number of reasons in support of its holding. First, the regulatory structure governing rates changed by carriers provided a mechanism for the recovery of damages. Id. at 162. Second, antitrust liability requires an injury or violation of a legal right. "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff," and the plaintiff suffered no injury as a result of paying the published tariff. Id. at 163. Third, the award of antitrust damages to the plaintiff "might, like a rebate, operate to give [the plaintiff] a preference over his trade competitors." Id. Fourth, determining damages would require the court to "reconstitut[e] the whole rate structure for many articles moving in an important section of the country." Id. at 164. Finally, "the damages alleged [by the plaintiff were] purely speculative." Id.

Since Keogh, the Supreme Court has revisited the filed rate doctrine on a number of occasions. See e.g. Montana-Dakota Util. Co. v N.W Public Serv. Co. 341 U.S. 246, 71 S.Ct. 692 (1951); Arkansas Louisiana Gas Co. v Hall, 453 U.s. 571, 101 S.Ct. 2925 (1981); Maislin Indus. U.S v Primary Steel Inc. 497 U.S. 116, 110 S.Ct. 2759 (1990). In these decisions, the Supreme Court has been concerned with two corresponding interests: (1) "potential 'discrimination' in rates as between

ratepayers," Wegoland, 27 F.3d at 19, and (2) "the 'justiciability' of determining reasonable rates." Id.

The filed rate doctrine was established to protect consumers from discrimination by monopolies. Rossi, 56 VAND. 1. Rev. at 1599. Price discrimination is condemned because "it maximizes the monopolist's profits ... while also encouraging the monopolist to waste resources in maintaining its dominant market position." Id. at 1600. "A utility with a filed tariff is prohibited from offering customers rebates and discounts that are at odds with the filed (and often approved) tariff." Jim Rossi, Beyond Goldwasser: Ex Post Judicial Enforcement in Deregulated Markets 2003. MICH. ST. DCL L. REV. 717, 720 (Fall 2003). With respect to rate discrimination, the filed rate doctrine prohibits a party "from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." H.J Inc. v N.W Bell Tel Co. 954 F.2d 485, 488 (8th Cir. 1992).

As the Supreme Court explained in Keogh any attempt by a court to determine relief from previously assessed rates would lead to complaining parties paying less than those who are not suing. Keogh, 260 U.S. at 163. Therefore, the filed rate doctrine prevents price discrimination between suing and non-suing parties. Wegoland, 27 F.3d at 21. In addition, the Keogh decision reasoned, "[u]niform treatment would not result, even if all [customers] sued, unless the highly improbably happened, and the several juries and courts gave to each the same measure of relief." Keogh, 260 U.S. at 163.

As a practical matter, the availability of class action litigation has developed since the Keogh decision and uniform treatment is more readily available now. Square D 476 U.S. at 423.

Additionally, "the greater sophistication in evaluating damages, might mitigate the expressed fears about the speculative nature" of antitrust damages. Id. "To be sure, the concerns for discrimination are substantially alleviated in putative class action[s]." Wegoland, 27 F.3d at 22.

In regards to the justiciability of determining reasonable rates, the filed rate doctrine "preserves the exclusive role of agencies in approving rates for ... services that are reasonable by keeping courts out of the rate-making issues." Marcus v AT&T Corp. 138 F.3d 46, 58 2nd Cir. 1998). As explained by the Second Circuit in Sun City Taxpayers Ass'n v Citizens Util. Co., 45 F.3d 58, 62 (2 Cir. 1995), "(1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set utility rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime." Sun City 45 F.3d at 62.

In light of criticisms, the Supreme Court directly addressed the continuing viability of the filed rate doctrine in antitrust actions in Square D Co. v. Niagara Frontier Tariff Bureau Inc. 476 U.S. 409, 106 S.Ct. 1922 (1986). In Square D, the Supreme Court admitted that it could assume "the Keogh decision was unwise as a matter of policy." Id. at 420. Nonetheless, the Court declined to overrule Keogh stating, "[s]tare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right." Id. at 424. "If there is to be an overruling of the Keogh rule, it must come from Congress, rather than from this Court." Square D Co., 476 U.S. at 424, 106 S.Ct. at 1931.

3. The Texas Electric Industry is a Regulated *Industry*

TCE contends that the filed rate doctrine does not apply to
the instant action since FERC possesses no regulatory authority over the Texas electricity market. TOE describes the filed rate doctrine as a consequence of Congressional intent to vest exclusive jurisdiction over federal power issues to FERC. (Pl.'s Resp. ¶2.18.) "Because Texas' electric power supply is strictly intrastate', FERC has no authority pursuant to the Interstate Commerce Clause"[11] (Pl.'s Resp. at 11) and the Court "should look to the Texas legislature's statutory intent not to invoke the filed rate doctrine." (Id. ¶2.18.)

Although the filed rate doctrine is commonly used to uphold rates approved by federal agencies such as FERC or the ICC, the doctrine was developed as a common law defense to federal antitrust litigation. See Keogh 260 U.S. 156 (discussed in Section III.B.2 above). "[T]he rationale underlying the filed rate doctrine applies whether the rate in question is approved by a federal or state agency." H.J Inc. 954 F.2d at 494; see also Wegoland 27 F.3d at 20; M.R Taffet v S. Co. 967 F.2d 1483, 1494 (11th Cir. 1992).

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[11] TCE's emphasis on the intra-state nature of the Texas energy market is noteworthy given that TCE is suing under federal antitrust laws. If the Texas energy market is truly intra-state, then this Court has no jurisdiction over the Sherman Antitrust Act Claims that require a nexus to interstate commerce. 15 U.S.C. §§ 1 and 2 (protecting "trade and commerce among the several states").

PUCT, as the regulatory agency charged with overseeing the Texas electricity market, possesses the institutional competence to address rate-making issues in the BES market, one of the principles underlying the filed rate doctrine. See Sun City, 45 F.3d at 62. Upon a finding of market power abuse by a participant in the Texas electricity market, PUCT is empowered by the Texas Legislature to remedy the situation by "seeking an injunction or civil penalties as necessary to eliminate or to remedy the market power abuse or violation as authorized by Chapter 15, by imposing an administrative penalty as authorized by Chapter 15, or by suspending, revoking, or amending a certificate or registration as authorized by Section 39.356." TEX. UTIL. CODE § 39.157(a) . PUCT has demonstrated its institutional competence in addressing rate-making issues when the MOD ordered market participants to return $30 million in illicit profits obtained as a result of abusive and improper scheduling practices in the BES market during August 2001. It must also be noted that MOD continues to investigate the market abuses alleged by TCE.

4. Savings Clause Does Not Bar Filed Rite Defense

The arguments of TCE focused on the savings clause and the intent of the Texas Legislature in drafting Senate Bill 7. TCE alleges that the filed rate doctrine should not apply to the Texas electricity market since the Texas Legislature did not intend for the restructuring of the Texas electricity market to prohibit civil antitrust lawsuits. Specifically, TCE cites to the savings clause in Section 39.158(b) of the Texas Public Utility Code:

> Nothing in [the chapter governing the restructuring process of the Texas electricity market] shall be construed to confer immunity

> from state or federal antitrust laws. This chapter is intended to complement other state and federal antitrust provisions. Therefore, antitrust remedies may also be sought in state or federal court to remedy anticompetitive activities.

TEX. UTIL. CODE § 39.158(b). The Fifth Circuit has stated that "the primary rule in statutory interpretation [is] that a court must give effect to legislative intent." In re CPDC Inc. 337 F.3d 436, 442 (5th Cir. 2003). TCE's argument is that the savings clause expresses the Texas Legislature's intent that the filed rate doctrine does not apply because nothing in the Act "shall be construed to confer immunity from state or federal antitrust laws." TEX. UTIL. CODE § 39.158(b).

As an initial matter, the filed rate doctrine does not provide immunity from antitrust liability. Square D Co. v Niagara Frontier Tariff Bureau Inc. 476 US. 409, 422, .06 S.Ct. 1922, 1929 (1986) . Instead, the doctrine only acts to bar private antitrust suits seeking damages stemming from rates paid to a regulated utility. Id. Companies that engage in illegal antitrust activities regarding filed rates are still subject to criminal sanctions or equitable relief, neither of which TCE has sought in the instant suit. Id. Furthermore, the filed rate doctrine does not bar antitrust challenges based on mergers or sales of assets by regulated utilities. Town of Norwood 202 F.3d at 422. Therefore, in accordance with the intent of the Texas Legislature, the filed rate doctrine does not confer immunity from federal or state antitrust laws.

In arguments before the Court, TCE relied on Verizon Communications Inc. v Law Offices of Curtis V Trinko LLP, ___, U.S. ____,124 S.Ct. 872 (2004) for the proposition that the savings clause found in § 39.158(b) precludes the application of the filed rate doctrine in the

instant action. In Verizon Communications Inc., a case not involving the filed rate doctrine, the Supreme Court interpreted the following antitrust savings clause from the Telecommunications Act of 1996: "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." Verizon Communications Inc. 124 S.Ct. at 878 (citing 47 U.S.C. § 152). The Supreme Court found that the Telecommunication Act's savings clause "barred a finding of implied immurity," Id., and "preserves those claims that satisfy established antitrust standards." Id. The Supreme Court further stated that "just as the 1996 [Telecommunication] Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act 'modify, impair, or supersede the applicability' of the antitrust laws." Id.

TCE argues that the savings clause found in § 9.158(b) should be interpreted in the same manner as the savings clause found in the Telecommunications Act of 1996. The Court agrees with TCE's contention. By its own terms, the savings clause in § 39.158(b) does not purport to modify the application of existing state and federal antitrust provisions that include the well-established common law defense of the file rate doctrine.

The Fifth Circuit has held that for a legislature to "abrogate a federal common law provision ... [the legislature must speak directly to the question addressed by the common law." Resolution Trust Corp. v Miramon 22 F. 3d 1357, 1360 (5th Cir, 1994). TCE argues that in absence of FERC regulation, the Court must look to the state legislative intent to determine the applicability of

the filed rate doctrine. What TCE fails to address is that the filed rate doctrine is a recognized part of federal antitrust law and the United States Congress is best situated to abrogate the filed rate doctrine. Seeing no amendments to the Sherman Antitrust Act addressing the filed rate doctrine, the Court concludes that the legislative intent of the United States Congress is that the filed rate doctrine is a valid defense to federal antitrust claims.

In conclusion, application of the filed rate doctrine in the instant action does not contravene the intent of the Texas Legislature because it does not confer immunity against antitrust liability. Additionally, the legislative intent of the Sherman Antitrust Act presumably is that the file rate doctrine is a valid defense to liability.

5. Rates Paid in the BES Market are Filed Rates

TCE also asserts that the filed rate doctrine does not bar its
antitrust claims since the Texas legislature did not include a filed rate requirement in the BES market. Prior to the 1999, electricity rates were set by the state, but Senate Bill 7 created market-based rates. The First Circuit has stated that the filed rate doctrine applies to market based rates. Town of Norwood Massachusetts v New England Power Co., 202 F.3d 4C8, 419 (1st Cir. 2000); see also In re California Wholesale Elec. Antitrust Litig., 244 F.Supp.2d 1072, 1079-80 (S.D. Cal. 2003) ; T & E Pastorino Nursery v Duke Energy Trading and Mktg., No. MDI 1405, 2003 WL 22110491, *4 (S.D. Cal. Aug 27, 2003); Campbell v San Diego Gas & Elec. Co., No. Civ 00-2382-RHW, 2001 WL 1860381, *3 (E.D. Wash. Sept. 19, 2001). As explained in Town of

Norwood, rates are considered filed rates and subject to agency review if the responsible regulatory agency is charged with "ensuring just and reasonable rates." Id. However, the court in Town of Norwood recognized that if "rates were truly left to the market, with no filing requirement or FERC supervision at all, the filed rate doctrine would by its terms no longer operate." Id.

In contrast, the Ninth Circuit had to decide whether insurance rates filed with Arizona and Wisconsin state regulatory agencies were entitled to protection under the filed rate doctrine. Brown v Ticor Title Ins Co., 982 F.2d 386, 394 (9th Cir. 1992). In both states, insurance companies were required to file their insurance rates with state regulatory agencies that have the power to disprove the rates. Id. at 393. The Court observed that the "absence of meaningful state review allows the insurers to file any rates they want." Id. at 394. "[I]f those rates were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, that the fact that they were filed does not render them immune from challenge." Id. Therefore, the filed rate doctrine was not applicable.

Unlike the insurance rates at issue in Ticor Title the BES market based rates are subjected to meaningful review by PUCT. PUCT is required to ensure "safe, reliable, and reasonably priced electricity." TEX. UTIL. CODE § 39.101(a) (1). PUCT is also required to ensure that Ancillary Services are available at "reasonable prices with terms and conditions not unreasonably preferential, prejudicial, discriminatory, predatory, or anticompetitive." TEX. UTIL. CODE § 39.004(e). In addition, rates in the BES market are capped at $1,000 per MWh. Therefore, wholesale power rates in Texas continue to be filed with PUCT since PUCT is charged

with ensuring reasonably priced electricity, and the filed rate doctrine applies to market based rates in the ERCOT administered electricity market.

6. The Competitor Exception to the Filed Rate Doctrine Does Not Apply to TCE's Claims

Finally, TCE asserts that its antitrust claims are exempt from the filed rate doctrine as a result of the "competitor exception" to the doctrine. The "competitor exception" to the filed rate doctrine holds that "an anticompetitive practice embodied in a [filed] tariff may violate the antitrust laws if it impacts upon competitors as opposed to customers." City of Groton v Connecticut Light & Power Co., 662 F.2d 921, 929 2' Cir. 1981). As explained in City of Groton, "if a utility that competes with a wholesale customer engages in a price squeeze by, charging the wholesale customer more than its retail customers, the filed rate doctrine may not be applicable." Id. However TCE does not complain of a price squeeze. "The traditional price squeeze involves a defendant who as a monopolist supplies the plaintiff at one level (e.g., wholesale), competes at another (e.g., retail), and seeks to destroy the plaintiff by holding up the wholesale price to the plaintiff while depressing the retail price to common customers." Town of Norwood 202 F.3d at 418. TCE only complains of rates paid for electricity as a wholesale customer in the BES market.

TCE cites Essential Communications Sys. Inc v Am Tel &

Tel Co., 610 F.2d 1114, 1122 (3 Cir. 1979), for its support of the competitor exception. In Essential Communications, the Third Circuit justified the competitor exception by stating:

In this case the plaintiff is not suing in the capacity of a customer for communication services. Essential seeks recovery for injury to its business or property from actions taken by the defendants in formulating a tariff, and in rendering customer services. The Bell System will not be asked to disgorge to any customers any revenues derived under the filed tariff. Indeed, it can continue to collect those revenues until a new tariff is filed. There is no policy conflict, actual or potential, therefore, between the Section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule.

Essential Communications, 610 F.2d at 1122. The instant suit can be distinguished from the action in Essential Communications. Here, TCE is requesting damages based on the rate it paid for wholesale electricity in the BES market, and Defendants will be "asked to disgorge to [TCE] any revenues derived under the filed tariff." Id. Therefore, the competitor exception to the filed rate doctrine does not preclude the application of the doctrine to the instant case.

7. Conclusion

TCE's federal antitrust claims are barred by the filed rate doctrine. See e.g. County of Stanislaus 114 F.3d at 862; Square D Co., 476 U.S. at 424, 106 S.Ct. at 1931; Keogh 260 U.S. at 165, 43 S.Ct. at 50. In the instant action, TCE claims that it was damaged by having to pay higher prices for electricity in the BES market as a result of Defendant's alleged economic withholding, physical withholding, market manipulation,

monopolization, attempted monopolization and/or conspiracy to monopolize.

The filed rate doctrine applies to state regulatory agencies such as PUCT and PUCT provides meaningful review to the rates on the BES market. H. J. Inc. 954 F.2d at 494. Therefore, the filed rate doctrine bars TCE's federal antitrust claims based on the rates it paid in Texas's regulated energy market. Accordingly, this Court grants Defendants' Motions to Dismiss TCE's Sherman Antitrust Act and Clayton Act claims pursuant to the filed rate doctrine.

C. STATE ANTITRUST CLAIMS

In its SAC, TCE alleges that Defendants violated § 15.10 of the TFEAA. Sections 15.01 et seq. of the TFEAA are the state law counterparts to federal antitrust law. Apani S.W. Inc. v CocaCola Enters. Inc. 300 F.3d 620, 628 (5th Cir. 20)2). The Texas legislature mandates that Texas antitrust law be harmonized with federal antitrust law. TEX. BUS. & COMM. CODE § :5.04; see also Apani 300 F.3d at 628. As a result, there is no need for federal courts to analyze TFEAA claims separately from Sherman Act claims. Johnson v Hosp Corp. of Am. 95 F.3d 383, 391 n.7 (5th Cir. 1996). Therefore, TCE's state antitrust claims under TFEAA must be dismissed pursuant to the filed rate doctrine as the Sherman Act claims have been dismissed.

D. FRAUD

Under Texas law, to recover for fraud, the plaintiff must establish: "(1) a material representation; (2) it was false when made; (3) the speaker either knew it was false or asserted it without knowledge of its truth; (4) the speaker intended that it be acted upon; (5) the

party acted in reliance; and (6) the party was injured as a result." Malacara v Garber, 353 F.3d 393, 403-04 (5th Cir. 2003)

TCE alleges that the TX(J Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, AP, TES, the TIE Defendants, Frontera, and Tractebel committed fraud by making fraudulent and misleading statements and representations in their affidavits to the MOD. TCE contends that as a result of Defendants' fraudulent affidavits TCE continued to participate in the ERCOT and BES markets for electricity. Defendants move to dismiss TCE's fraud claim under the filed rate doctrine.

As with TCE's antitrust claims, TCE's fraud claim is barred by the filed rate doctrine. Taffet, 967 F.2d at 1494-95 ("A regulated entity's alleged fraud does not create a right to a reasonable rate that exists independently of agency action. Thus, even if the filed rate is obtained through fraud, it remains true that one does not suffer the predicate 'injury to business or property' by paying the filed rate."). The alleged damage suffered by TCE as a result of participating in the Texas electricity market stems from the rates TCE paid for electricity. Any measure of harm suffered by TCE as a result of Defendants' fraud could only be determined by calculating the amount TCE overpaid for electricity, a result barred by the filed rate doctrine. See Transmission Agency of N. California v. Sierra Pac Power Co. 295 F.3d 918, 933 (9th Cir. 2002). As the Second Circuit explained in Wegoland:

> If courts were licensed to enter this process under the guise of ferreting out fraud in the rate-making process, they would unduly subvert the regulating agencies' authority and

> thereby undermine the stability of the system. For only by determining what would be a reasonable rate absent the fraud could a court determine the extent of the damages. And it is this judicial determination of a reasonable rate that the riled rate doctrine forbids.

Wegoland, 27 F.3d at 21.

Therefore, as a result of the filed rate doctrine, this Court grants Defendants' Motions to Dismiss TCE's fraud claim.

E. NEGLIGENT MISREPRESENTATION

To prevail in a negligent misrepresentation action in Texas, the plaintiff must prove:

> (1) the defendant made a representation in the course of his business, or in a transaction in which he had a pecuniary interest, (2) the defendant supplied false information for the guidance of others in their business, (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information, and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation.

Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co. 313 F.3d 305, 318 (5th dr. 2002).

TCE's negligent misrepresentation claim mirrors its fraud claim. TCE claims that the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, AP(, TES, the TIE Defendants, Frontera, and Tractebel supplied false information in

their affidavits filed with the MOD. TCE contends that it relied upon Defendant's affidavits to its detriment by continuing to participate in the ERCOT and BES markets for electricity. Defendants move to dismiss TCE's negligent misrepresentation claim pursuant to the filed rate doctrine.

TCE's negligent misrepresentation claim is also barred by the filed rate doctrine. Marcus v AT&T Corp. 138 F.3i 46, 57-58, 64 (2 Cir. 1998) (stating that a claim for negligent misrepresentation was barred by the filed rate doctrine). Any award of damages on TCE's negligent misrepresentation claim would require the court to determine what the rate for electricity would have been absent Defendant's alleged conduct, a practice barred by the filed rate doctrine. See H.J. Inc., 954 F.2d at 488.

Therefore, pursuant to the filed rate doctrine, this Court grants Defendants' Motions to Dismiss TCE's negligent misrepresentation claim.

F. BREACH OF CONTRACT

TCE alleges breach of contract claims against the TXU Defendants, the Texas Genco Defendants, the Reliant Defendants, and ERCOT. The elements for breach of contract in Texas are: "1) the existence of a valid contract; 2) performance or tendered performance by the plaintiff; 3) breach of the contract by the defendant; and 4) damages to the plaintiff resulting from the breach." Lewis v Bank of Am. 343 F.3d 540, 545 5th Cir. 2003).

1. TCE' s Breach of Contract Claim against the TXU Defendants

TCE's breach of contract claim against the TXU Defendants stems from Confidentiality Agreements entered into between TCE and the TXU Defendants on August 6, 2002 and October 15, 2002. The TXU Defendants move to dismiss TCE's breach of contract claim under the filed rate doctrine. However, the filed rate doctrine only applies to claims regarding the reasonableness of rates filed by a regulated industry, See Wegoland Ltd. 27 F.3d at 18, and TCE's breach of contract claim against the TXU Defendants does not implicate the prices it paid for electricity in the BES market.

In the instant action, TCE states a claim for relief against the TXU Defendants for breach of contract. TCE alleges that: (1) there were valid contracts between TCE and the TXU Defendants; (2) TCE satisfied all conditions precedent to the confidentiality Agreements; (3) the TXU Defendants breached their confidentiality Agreements by disclosing TCE's financial and business status to both existing and prospective customers of TCE; and (4) TCE sustained damage to its business and financial reputation, lost income, lost business, and lost profits as a result of the breach by the TXU Defendants. See Lewis 343 F.3d at 5.5. Therefore, TXU's Motion to Dismiss TCE's breach of contract claim pursuant to the filed rate doctrine is denied.

2. TCE's Broach of Contract Claim against the Texas Genco Defendants

The Texas Genco Defendants move for dismissal of TCE's breach of contract claim on the grounds that TCE had no contract with the Texas Genco Defendants. TCE fails to allege that a Confidentiality Agreement or any other valid contract was entered into with the Texas Genco Defendants. Therefore, TCE's breach of contract

claim against the Texas Genco Defendants is dismissed for failure to allege the existence of a valid contract. See Lewis, 343 F.3d at 545. Therefore, the Texas Genco Defendants' Motion to Dismiss TCE's breach of contract claim is granted.

3. TCE's Breach of Contract Claim against the Reliant Defendants

The breach of contract claim against the Reliant Defendants arises from a Confidentiality Agreement entered into between TCE and the Reliant Defendants on February 27, 2003 The Reliant Defendants fail to address the breach of contract claims brought against them in their Motion to Dismiss, therefore, the Reliant Defendants' Motion to Dismiss the breach of contract claim is denied.

4. TCE's Breach of Contract Claims Against ERCOT

TCE bases its breach of contract claims against ERCOT on the "Standard Form Load Serving Entity Agreement" entered into on October 24, 2001, and the "Standard Form Qualified Scheduling Entity Agreement" entered into on July 5, 2002. TCE asserts two separate breach of contract claims against ERCOT: (1) that the defamatory statements made by Tom Noel, ERCOT's CEO, violated TCE's agreements with ERCOT and (2) that ERCOT's verbal dispatch instructions on February 25, 2003 to Defendant TXU for additional power violated TCE's agreements with ERCOT. ERCOT's Motion to Dismiss fails to address the first claim regarding the defamatory statements made by Tom Noel, therefore, ERCOT's Motion to Dismiss this claim is denied.

ERCOT moves to dismiss TCE's second breach of contract claim on the grounds that ERCOT did not violate its own protocols. However, TCE's breach of contract claim stemming from ERCOT's verbal dispatch instructions on February 25, 2003 to the TXU Defendants for additional power is barred by the filed rate doctrine. See e.g. ICOM Holding Inc. v MCI Worldcom Inc. 238 F.3d 219, 222-23 (2 Cir 2001) (finding that a breach of contract claim is barred by the filed rate doctrine); Fax Telecommunicaciones Inc. v. AT&T 138 F.3d 479, 488 (2 Cir. 1998). TCE alleges that it suffered damages in the form o higher prices in the BES energy market as a result of ERCOT's failure to follow its own protocols. Any award of damages on TCE's breach of contract claim would require the court to determine what the rate for electricity would have been absent ERCOT's alleged breach, a practice barred by the filed rate doctrine. See H.J Inc. 954 F.2d at 488. Therefore, the Court sua sponte dismisses TCE's second breach of contract claim against ERCOT pursuant to the filed rate doctrine. It is well settled that the Court may dismiss a complaint on its own initiative for failure to state a claim where the inadequacy of the claim is apparent as a matter of law. Guthrie v Tifco Indus. 941 F.2d 374, 379 (5 Cir. 1991).

In conclusion, this Court dismisses TCE's breach of contract claim against the Texas Genco Defendants and TCE's breach of contract claim against ERCOT regarding ERCOT's verbal dispatch instructions to the TXU Defendants.

G. DEFAMATION

TCE alleges that ERCOT committed defamation when ERCOT's CEO, Tom Noel, made the following statements to the press: (1) "[H]e doesn't know of any

other company as active as TCE in the spot electricity market" (SAC & 394); (2) "TCE was in financial trouble almost a month before" (SAC & 394); (3) "TCE was briefly buying 100% of its power demand at that price, and was finally unable to meet its financial obligations" (SAC & 394); and 4) "TCE, which relied on the balancing energy market for its entire load during some periods, had charges of more than $5-million when balancing energy prices in ERCOT spiked." (SAC & 397.)

To state a defamation claim in Texas, "the plaintiff must prove that the defendant: (1) published a statement; (2) that was
defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement." WFAA-TV In: v McLemore, 978 S.W.2d 568, 571 (Tex. 1998). ERCOT moves for dismissal on the grounds that Tom Noel's statements were not defamatory or malicious.

1. Defamatory

A statement is "defamatory if it exposes a person to public contempt or financial injury, or if it impeaches a person's reputation." Basic Capital Mgmt. Inc. v. Dow Jon's & Co. Inc., 96 S.W.3d 475, 480 (Tex. App.-Austin 2002, no pet.). Whether a statement is "capable of a defamatory meaning is initially a question for the court." Turner v [illegible]K Television Inc. 38 S.W.3d 103, 114 (Tex. 20[illegible]. "[T]he court construes the statement as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement." Columbia Valley Reg'l Med. Ctr. v Banrert 112 S.W.3d 193, 198 (Tex. App. - Corpus

Christi 2003, no pet.,. A statement "may be false, abusive, unpleasant, or objectionable to the plaintiff and still not be defamatory in light of the surrounding circumstances." Columbia Valley, 112 S.W.3d at 198. However, "when a publication is of ambiguous or doubtful import, the jury must determine its meaning." Turner, 38 S.W.3d at 114.

2. Mens Rea

Both TCE and ERCOT contend that the appropriate standard to be used in evaluating TCE's defamation claim is the malice standard for a public official or figure. Therefore, this court will limit its analysis to the question of whether or not ERCOT's statements were published with malice. Whether or not a statement was published by the defendant while acting with actual malice "focuses on the defendant's state of mind at the time of publication." Forbes v. Granada Biosciences Inc, 124 S.W.3d 167, 173 (Tex. 2003). To prove actual malice it must be shown that the "defendant made a statement with knowledge that it was false or with reckless disregard of whether it was true or not." Id. at 171. For a public figure to establish reckless disregard, the defendant must have "entertained serious doubts as to the truth of his publication." Id.

3. TCE's Defamation Claim

TCE states a claim for relief for defamation against ERCOT. In the instant case TCE alleges that ERCOT published statements; ERCOT's statements were defamatory since they injured TCE's business and financial reputation by casting TCE"; financial and business position in a negative light; and ERCOT's statements were malicious since they were false, and ERCOT, as the entity under contract with PUCT to

administer the BES market, had direct knowledge of TCE's financial affairs. This Court makes no prospective judgment on the merits of TCE's claim, only that TCE's claim has been adequately stated and pled. Fed. R Civ. p. 8(a). Therefore, TCE states a valid claim for relief, and ERCOT's Motion to Dismiss TCE's defamation claim must be denied.

H. BUSINESS DISPARAGEMENT

TCE asserts a business disparagement claim against ERCOT. The elements of a claim for business disparagement are: (1) publication by the defendant (2) of disparaging words (3) which are false; (4) published with malice; (5) published without privilege; and (6) special damages to the plaintiff. C.P Interests Inc. v. California Pools Inc. 238 F.3d 690, 694 (5th Cir. 2001). "To prove special damages, a plaintiff must provide evidence of direct, pecuniary loss attributable to the false communications of the defendants." Johnson v. Hosp Corp. of Am., 95 F. 3d 383, 391 (5th Cir. 1996). A claim for business disparagement is similar to a claim for defamation, but "defamation actions chiefly serve to protect the personal reputation of an injured party, while a business disparagement claim protects economic interest." Forbes 124 S.W.3d at 170. ERCOT moves for dismissal on the grounds that Tom Noel's statements were not defamatory, were not malicious, and did not cause special damages.

Similar to TCE's claim for defamation, TCE states a valid claim for business disparagement against ERCOT. TCE alleges that ERCOT published statements that were false, disparaging and malicious. Furthermore, ERCOT fails to allege that it had a privilege to publish the statements. TCE alleges that it suffered special damages in the form of damage to its business and

financial reputation, lost income, lost business, and lost profits. Again, this Court makes no prospective judgment on the merits of TCE's claim, only that TCE's claim for business disparagement has been adequately stated and pled. Fed. R. Civ. P. 8(a). Therefore, TCE states a valid claim for relief, and ERCOT's Motion to Dismiss TCE's business disparagement claim must be denied.

I. CIVIL CONSPIRACY

TCE alleges that the TXU Defendants, AEP Defendants, Reliant Defendants, APX, Odessa-Ector Power Partners, Guadalupe Power Partners, Frontera Generation, Tractabel Energy Marketing, Inc., and ERCOT committed civil conspiracy. Under Texas law, five elements are necessary to establish an actionable claim for civil conspiracy: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." Apani S.W. Inc. v Coca-Cola Enters. Inc. 300 F.3d 620, 635 (5th Cir. 2002). In addition, TCE must plead an underlying tort for its civil conspiracy claim to be actionable. See Tilton v Marshall 925 S.W.2d 672, 681 (Tex. 1996).

The TXU Defendants move to dismiss TCE's civil conspiracy claim pursuant to the filed rate doctrine. The AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APK, TES, the TIE Defendants, Frontera, and Tractebel move to dismiss TCE's civil conspiracy claim for failure to plead an underlying tort. In its SAC, TCE alleges that the underlying tort supporting its civil conspiracy claim against the TXU Defendants, the AEP Defendants, the Texas Genco

Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel is fraud. As stated above, TCE's fraud claim has been dismissed, and the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel's Motions to Dismiss TCE's civil conspiracy claim must be granted. See Tilton 925 S.W.2d at 681. In addition, the Court sua sponte dismisses TCE's civil conspiracy claim against the TXU Defendants for failure to plead an underlying tort.

ERCOT moves to dismiss TCE's conspiracy claim on the grounds that TCE's underlying tort claim fails and TCE failed to set forth facts demonstrating that Defendants had a meeting of minds. TCE alleges that the underlying tort supporting its civil conspiracy claim against ERCOT is both defamation and business disparagement. Since TCE's defamation and business disparagement claims against ERCOT are not dismissed, TCE succeeds in pleading an underlying tort. In addition, TCE pleads that ERCOT had a meeting of the minds with Defendants to remove TCE from the Texas electricity market, and that TCE suffered damage as a result of ERCOT's defamation and business disparagement. See Apani 300 F.3d at 635. Therefore, ERCOT's Motion to Dismiss TCE's civil conspiracy claim is denied.

J. ERCOT'S MOTION TO STAY

ERCOT moves to stay the instant case pursuant to either the doctrine of primary jurisdiction or the Burford abstention doctrine. In light of the fact that this Court is dismissing TCE's complaint, this Court denies ERCOT's Motion to Stay the proceedings as moot.

K. TCE's MOTION TO AMEND

TCE requests leave to amend its complaint. Rule 15(a) of the Fed. R. Civ. P. states that leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). TCE does not explain what amendments it would like to make to the SAC and how any amendment would save the claims that are dismissed by this Order. Given the fact that TCE has twice previously amended its complaint, the Court does not find granting TCE leave to amend its complaint a third time to be in the interest of justice. See United States v Regents of the Univ. of California 363 F.3d 398. 403 (5th Cir. 2004) (stating that leave to amend may be denied for "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."). Therefore, TCE's request for leave to amend its complaint is denied.

IV. CONCLUSION

For the reasons stated above, Defendants' Motions to Dismiss are granted in part. This Court DISMISSES the following claims: TCE's §§ 1 and 2 of the Sherman Antitrust Act, and § 15.05(a)—(c) and §15.10 of the TFEAA claims against all Defendants; TCE's fraud claims against all Defendants; TCE's negligent misrepresentation claims against all Defendants; TCE's breach of contract claim against the Texas Genco Defendants; TCE's breach of contract claim against ERCOT regarding ERCOT's verbal dispatch instructions to TXU; and TCE's civil conspiracy claim against the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel.

Because the federal action has been dismissed, this Court declines supplemental jurisdiction over TCE's remaining state law claims. See 28 U.S.C. § 1367(c) (3); see also Priester v. Lowndes County 354 F.3d 414, 425 (5th Cir. 2004). In addition, this Court does not possess diversity jurisdiction over TCE's remaining state law claims since TCE, the TXU Defendants, and ERCOT are all citizens of Texas. See 28 U.S.C. § 1332(a)(1); see also Corfield v Dallas Glen Hills LP, 355 F.3d 853, 857 (5th Cir. 2003). Therefore, the following causes of action are DISMISSED without prejudice: TCE's breach of contract claims against the TXU Defendants, the Reliant Defendants, and ERCOT regarding Tom Noel's statements; TCE's defamation claim against ERCOT; TCE's business disparagement claim against ERCOT; and TCE's civil conspiracy claim against ERCOT. In addition, both ERCOT's Motion to Stay and TCE's Motion to Amend are DENIED.

SIGNED and ENTERED on this the 24th of June, 2004.

s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

TEXAS COMMERCIAL ENERGY,	§	
PLAINTIFF,	§	
vs.	§	C.A. NO. C-03-249
TXU ENTERY, INC, et al	§	

FINAL JUDGMENT

Pursuant to this Court's Order Granting in Part of Defendants' Motions to Dismiss, the Court hereby ENTERS Final Judgment.

The following causes of action are dismissed: TCE's §§ 1 and 2 of the Sherman Antitrust Act, and § 15.05 (a) – (c) and § 15.10 of the TFEAA claims against all Defendants; TCE's fraud claims against all defendants: TCE's negligent misrepresentation claims against all Defendants: TCE's breach of contract claim against the Texas Genco Defendants; TCE's breach of contract claim against ERCOT regarding ERCOT's verbal dispatch instructions to TXU; and TCE's civil conspiracy claim against the TXU Defendants, the AEP Defendants, the Texas Genco Defendants, the Reliant Defendants, APX, TES, the TIE Defendants, Frontera, and Tractebel.

The following causes of action are DISMISSED

without prejudice: - TCE's breach of contract claims against the TXU Defendants, the Reliant Defendants, and ERCOT regarding Tom Noel's statements; TCE's defamation claim against ERCOT; TCE's business disparagement claim against ERCOT; and TCE's civil conspiracy claim against ERCOT.

SIGNED and ENTERED on this the 24th day of June, 2004.

s/ Janis Graham Jack
JANIS GRAHAM JACK
UNITED STATES DISTRICT JUDGE